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THE POWER OF THE LEGISLATURE TO CREATE AND ABOLISH COURTS OF JUSTICE.

THE tenure of good behavior for the judicial office is too well established in Massachusetts as a wise rule of public policy, sanctioned by long experience, and affirmed by the people as often as the question has been submitted to them, to justify, at this day and in this Commonwealth, even an outline of the reasons in its support. But the extent to which the Legislature may be permitted, consistently with this principle, to remodel the courts of justice as the wants of the people may from time to time require, is not so generally understood.

The independence of judicial tenure is of course of peculiar importance in the highest court of judicature, before which all questions of law are finally brought, and by whose decisions harmony and uniformity in the administration of justice are secured. The framers of the Constitution, mindful of this, not only provided, generally, in c. 3, art. 1, that "all judicial officers, duly appointed, commissioned and sworn, shall hold their offices during good behavior, excepting such concerning whom there is different provision made in this Constitution," but also inserted in the Declaration of Rights, prefixed to the Constitution, the following article: "It is essential to the preservation

of the rights of every individual, his life, liberty, property and character, that there be an impartial interpretation of the laws, and administration of justice. It is the right of every citizen to be tried by judges as free, impartial and independent, as the lot of humanity will admit. It is therefore not only the best policy, but for the security of the rights of the people, and of every citizen, that the judges of the Supreme Judicial Court should hold their offices as long as they behave themselves well; and that they should have honorable salaries ascertained and established by standing laws." Declaration of Rights, art. 29. And it is worthy of observation that in the Convention which framed the Constitution of Massachusetts this last provision, as reported by the committee on the Declaration of Rights, extended to all judges, and was limited by the Convention to the Supreme Judicial Court. Journal of Convention of 1779–80, pp. 43, 197.

As, in that free discussion of public questions, which is the right and the habit of the people of the Commonwealth, it has sometimes been suggested that, in theory, the Supreme Judicial Court itself may not be beyond legislative control, and even destruction, it is worth while to examine the meaning of the words, in the article just cited, "that the judges of the Supreme Judicial Court should hold their offices as long as they behave themselves well;" and in order to do this understandingly, it is necessary, at some risk of tediousness, to recapitulate the circumstances attending the first use of these words.

When the Constitution of Massachusetts was adopted, there was no court whose style or title was "the Supreme Judicial Court." The highest judicial court of the Province of Massachusetts Bay was the "Superior Court of Judicature, Court of Assize and General Gaol Delivery," established by the provincial statute of 1699, invested with jurisdiction of all pleas of the crown and real and personal actions legally brought before it, "and generally of all other matters as fully and amply to all intents and purposes whatsoever, as the Courts of King's Bench, Common Pleas and Exchequer within his Majesty's Kingdom of England have or ought to have," and consisting of a chief justice and four associates. Anc. Chart. 330, 331. That court was the first permanent Superior Court in the Province; the similar statute of 1692 having been disallowed

by the King, because it undertook to establish courts of chancery. Washburn's Judicial History of Massachusetts 154, 155. The justices of the Superior Court of Judicature, holding commissions from the Provincial Governor had been removed, together with all other civil and military officers appointed in like manner, by the act of the General Court of July 19th, 1775, and others from time to time appointed in their stead "by the major part of the Council of the State of Massachusetts Bay." The Superior Court, at the time of the adoption of the Constitution, consisted of William Cushing, Chief Justice, (the only one of the judges, appointed by the Provincial Governor, who had been re-appointed,) and three Associate Justices, Nathaniel Peaslee Sargeant, David Sewall, and James Sullivan; Jedediah Foster, the other associate, having died in the previous year, pending the session of the Convention that framed the Constitution, and his place not having been filled. The Constitution took effect on the last Wednesday in October, 1780; but these four judges, in the exercise of the authority given by the ninth article of the sixth chapter of the Constitution, "to the end there may be no failure of justice, or danger arise to the Commonwealth from a change of the form of government," proceeded in the execution of their business, and held the last term of the Superior Court of Judicature at Cambridge in the third week of November, 1780. On the 12th of February, 1781, the Legislature of the Commonwealth passed the following act, which is not printed at length in the edition of the laws now in general use.

"An Act for establishing salaries of a fixed and permanent value for the Justices of the Supreme Judicial Court. Whereas the Constitution of this Commonwealth provides that an establishment should be made for an honorable stated salary, of a fixed and permanent value, for the Justices of the Supreme Judicial Court: Be it therefore enacted, by the Senate and House of Representatives in General Court assembled, and by the authority of the same, That the sum of three hundred and twenty pounds be and hereby is established as the annual salary of the Chief Justice of the Supreme Judicial Court for the time being; and the sum of three hundred pounds be and hereby is established as the annual salary of each of the other Justices of the Supreme Judicial Court for the time being;

the same to be paid in quarterly payments to the said Justices respectively, out of the Treasury of this Commonwealth, and to be considered as an adequate salary for the services of their office, without the addition of any fee or perquisite whatever. And be it further enacted by the authority aforesaid, That the sums mentioned in this act be computed in silver at six shillings and eight pence per ounce, and payable either in silver or bills of public credit equivalent thereto."

On the 16th of February, 1781, before the Legislature had passed any other act in which the highest court was mentioned, (except an act of the 25th of January, 1781, empowering "the Justices of the Supreme Judicial Court of this Commonwealth, or the major part of them," to determine the value of bills of credit emitted by the United States or by this State, and provided that "before the said judges proceed to act upon the business assigned them as aforesaid, they shall be sworn to the faithful discharge of their office,") John Hancock, having been chosen the first Governor of the Commonwealth, appointed and commissioned each of the four judges of said Superior Court of Judicature to be "one of the Justices of the Supreme Judicial Court of the Commonwealth of Massachusetts," authorizing him "to exercise all and signalize all powers and authorities which, by the Constitution and the laws of the Commonwealth, to that office do appertain; and with any two or more justices of the same court according to the tenor of their commissions, to take cognizance," &c. (setting forth their jurisdiction and powers according to the laws of the Province, as modified by the Constitution,) "and to have all the powers and authorities which the Superior Court of Judicature, Court of Assize and General Gaol Delivery of the Territory, now called the Commonwealth of Massachusetts, heretofore had and held, excepting where the Constitution and Frame of Government hath provided or shall hereafter provide otherwise." On the 20th (being the third Tuesday) of February, 1851, these commissions were read at the first term of the Supreme Judicial Court, held pursuant to a Provincial statute of July 19th, 1775, at Dedham, within and for the county of Suffolk, which then included Norfolk. On the same 20th of February, the Legislature passed the following act:

"An Act empowering the Supreme Judicial Court to

take cognizance of matters heretofore cognizable by the late Superior Court. Whereas by the laws heretofore made by the General Assembly of the late Province, Colony and State of Massachusetts Bay, a Superior Court of Judicature, Court of Assize and General Gaol Delivery was constituted, and sundry powers and authorities are given to the same court by particular laws: And whereas, by the Constitution and Frame of Government of the Commonwealth of Massachusetts, the style and title of the same court is now the Supreme Judicial Court of the Commonwealth of Massachusetts: And the Constitution aforesaid having provided that the laws heretofore made and adopted should continue and be in force until they shall be altered or repealed by the Legislature; whence some doubts may arise whether the Supreme Judicial Court shall have cognizance of those matters which by particular laws were expressly made cognizable by the Superior Court of Judicature, Court of Assize and General Gaol Delivery: Be it therefore enacted, by the Senate and House of Representatives, in General Court assembled, and by the authority of the same, That the court which hath been or shall be hereafter appointed and commissioned according to the Constitution, as the Supreme Judicial Court of this Commonwealth, shall have cognizance of all such matters as have heretofore happened, or shall hereafter happen, as by particular laws were made cognizable by the late Superior Court of Judicature, Court of Assize and General Gaol Delivery, unless where the Constitution and Frame of Government hath provided otherwise."

The number of justices of this court was not fixed by the Legislature, nor any additional judge appointed, until the 3d of July, 1782, when the Legislature passed "an Act establishing a Supreme Judicial Court in this Commonwealth," to consist of a chief justice and four other justices. The whole phraseology of that act is prospective; but the judges already appointed of course continued to hold under it.

In the light of these facts, we are irresistibly led to the conclusion that the words "Supreme Judicial Court," as used in the Constitution of Massachusetts, do not mean merely a particular court of that style and title; but are words of description, embracing the highest judicial tribunal, the highest court of judicature of the Commonwealth,

whatever its name may be. The very fact that the organization of the Supreme Judicial Court has remained substantially unchanged for nearly eighty years makes it very difficult, at the present day, to apply the words of the Constitution, even in imagination, to any other court. But it is to be remembered that the words, when first used, called up no such association. They were aptly chosen to define the meaning in view. "Supreme" is literally "highest," and may well have been substituted for "superior," (the adjective theretofore uniformly applied to the highest court of the Province,) in order to avoid the possibility of a higher still, indicated by the use of that word. Indeed that name may have been originally selected for the reason that under the Province Charter, and until the Revolution, an appeal lay from that court to the King in Council. Anc. Chart. 32.

The Constitution further declares that the judges of the Supreme Judicial Court shall hold "their offices" during good behavior; that is to say, shall, so long as they behave themselves well, hold the office of judge of the highest judicial tribunal of the Commonwealth. As there can never be but one highest judicial tribunal, and always must be one, so long as a judiciary department (without which no government can be administered) exists, it seems to follow that the Justices of the Supreme Judicial Court, (giving these words the same meaning in their commissions, that they have in the Constitution,) are entitled, by virtue of these commissions, to take their seats in any highest court that may be created, be it called Superior Court, Court of Errors, Court of Appeals, or by any other name whatever, provided it be the court invested with the power to prevent and correct the errors and abuses of all inferior courts.

The contemporaneous construction, shown by the facts before stated, most remarkably confirms this view. The Constitution provided that all the laws, theretofore adopted, used and approved in the Province, Colony, or State of Massachusetts Bay, should remain in full force, until altered or repealed by the Legislature; "such parts only excepted as are repugnant to the rights and liberties contained in this Constitution;" c. 6, art. 6; but it also provided that all judicial officers should be appointed by the Governor; c. 2, § 1, art. 9. The first Governor, as we have seen, without any authority from the State Legislature,

or other instruction, except the Constitution; without any direction even as to the number of judges whom he might commission, except the Province law of 1699, establishing the Superior Court of Judicature; proceeded at once to commission all the justices of that court, and no others, as Judges of the Supreme Judicial Court of this Commonwealth. The Legislature, (who had already established the salaries of these judges,) four days later, to avoid any possibility of doubt concerning the continuance of the old Superior Court, declared that "by the Constitution and Frame of Government of the Commonwealth of Massachusetts, the style and title of the same court is now the Supreme Judicial Court of the Commonwealth of Massachusetts;" and vested the supreme judicial authority in the Supreme Judicial Court already so commissioned by the Governor. And the supreme judges, on the very day of the passage of this act, held their first term, the time and place of which were fixed only by the Province laws concerning the Superior Court. It would be difficult to find an instance in which the construction of a constitutional provision was more immediately and distinctly determined by the concurrent acts of the three great departments of the government.

But the Constitution of Massachusetts does not leave the protection of the supreme judges here. After declaring, in the article of the Declaration of Rights, already cited, that "it is not only the best policy, but for the security of the rights of the people, and of every citizen," that these judges "should have honorable salaries ascertained and established by standing laws," it repeats the same principle in the Frame of Government, in these words: "Permanent and honorable salaries shall also be established by law for the justices of the Supreme Judicial Court;" c. 1, § 1, art. 13. The preamble of the statute of February 12th, 1781, already cited, stating that "the Constitution of this Commonwealth provides that an establishment should be made for an honorable stated salary of a fixed and permanent value for the justices of the Supreme Judicial Court," shows that the first legislature of Massachusetts understood that the amount of the salary must be beyond the power of reduction. Sixty-two years later, the legislature of 1843, (by St. 1843, c. 9,) unfortunately illustrated the wisdom of the remark made by Alexander Hamilton, in

reference to this provision of our Constitution: "The enlightened friends to good government, in every State, have seen cause to lament the want of precise and explicit precautions in the State Constitutions on this head. Some of these have indeed declared that *permanent* salaries should be established for the judges; but the experiment has in some instances shown that such expressions are not sufficiently definite to preclude legislative evasions." Federalist, No. 79. But it is a satisfaction to the friends of good government, in this Commonwealth, at least, to know that the highest judicial authority has been expressed in a form which forbids any insinuation of unworthy motive or influence, in favor of the sufficiency of this provision. For it is well known that the present Chief Justice of the Commonwealth refused to receive any salary whatever from the State Treasury, after the act of 1843 undertook to reduce these salaries, until the legislature of the succeeding year, (by St. 1844, c. 24,) restored the salaries to their former standard, and made compensation for the reduction. It is also worthy of remark, that the Convention, held in 1853 to revise the Constitution of Massachusetts, adopted, without a division, the following amendment, introduced, with the avowed intention to make the provision "so explicit that it would not be misunderstood," by Judge Morton, (who had, as Governor, approved the act of 1843,) "the justices of the Supreme Judicial Court shall receive honorable salaries, which shall not be diminished during their continuance in office." 2 Debates in Convention of 1853, 697.

The Constitution also secures, with peculiar care, the permanent separation of the highest judicial office from all other duties, by the following provision: "No Governor, Lieutenant-Governor, or Judge of the Supreme Judicial Court, shall hold any other office or place, under the authority of this Commonwealth, except such as by this Constitution they are admitted to hold, saving that the Judges of the said court may hold the offices of Justice of the Peace through the State; nor should they hold any other place or office, or receive any pension or salary from any other state or government or power whatever." c. 6, art. 3.

The only other provision of this Constitution, exclusively applicable to the Supreme Judicial Court, of itself dis-

tinctly recognizes it as an essential part of the government. "Each branch of the Legislature, as well as the Governor and Council, shall have authority to require the opinions of the Justices of the Supreme Judicial Court, upon important questions of law, and upon solemn occasions;" c. 3. art. 2.

It can surely require no additional argument to show that the Judges of the highest judicial tribunal of the Commonwealth, described as such in the Declaration of Rights; whose tenure of that office is declared to be during good behavior; for the permanent setting apart of whose office and payment of whose salaries the Constitution provides peculiar safeguards; and who are the constitutional advisers of the other departments of the government; must continue at the head of the judicial department, unless removed upon impeachment, or address of the two branches of the Legislature.

The inferior Courts of Judicature are placed by the Constitution on a very different footing from the Supreme Judicial Court. Their judges, it is true, are appointed by the Governor, and hold during good behavior, except Justices of the Peace. But they are none of them, other than Judges of Probate, specifically mentioned in the Constitution, except in those clauses which declare the incompatibility of offices; and there is no provision for paying them by salaries. Indeed the judges of all the inferior courts were paid by fees only, for forty years after the Constitution was adopted. For instance, in the act of June 27th, 1782, establishing and regulating fees of certain "officers and other persons," we find: "In the Court of Common Pleas. Justices' fees. — For the entry of every action, three shillings; and for every action where an issue in law or fact is joined, six shillings, in addition to the fee for entry; taxing a bill of cost, sixpence; granting an appeal and taking a recognizance of the principal and surety or sureties, one shilling." So, among the "Judge of Probate's fees." — "For granting administration, three shillings;" "for a decree respecting the probate of a will or codicil, three shillings and sixpence;" "a citation, ninepence; summons for witnesses, fourpence;" "granting an appeal to the governor and council, one shilling." The same act provided for justices' fees to be paid to the clerk of the Supreme Judicial Court, and received of him by the Justices and deducted from the amount of their salaries. All these

fees are somewhat at variance with modern notions of the proper mode of compensating judges. But salaries were first established for the Court of Common Pleas in 1821, and for the Judges of Probate in 1824. See Sts. 1820, c. 79, §§ 10, 11; 1823, c. 141, § 1. And Justices of the Peace are paid by fees to this day.

On the other hand, the Constitution contains the following provisions, copied almost word for word from the Province Charter:

"The General Court shall forever have full power and authority to erect and constitute judicatories and courts of record, or other courts, to be held in the name of the Commonwealth, [under the Charter, in the name of the King,] for the hearing, trying and determining of all manner of crimes, offences, pleas, processes, plaints, actions, matters, causes and things whatsoever, arising or happening within the Commonwealth, [under the Charter, within the Province,] or between or concerning persons inhabiting or residing or brought within the same; whether the same be criminal or civil, or whether the said crimes be capital or not capital, and whether the said pleas be real, personal or mixed." Constitution of Massachusetts, c. 1, § 1, art. 3. Anc. Chart. 32.

"And further, full power and authority are hereby given and granted to the said General Court, from time to time, to make, ordain and establish all manner of wholesome and reasonable orders, laws, statutes and ordinances, directions and instructions, either with penalties or without, so as the same be not repugnant or contrary to this Constitution, [by the Province Charter, 'to the laws of this our realm of England,'] as they shall judge to be for the good and welfare of this Commonwealth, [by the Charter, of the Province,] and for the government and ordering thereof, and of the subjects [by the Charter, 'inhabitants,'] of the same, and for the necessary support and defence of the government thereof; and to name and settle annually, or provide by fixed laws for the naming and settling [The clause as to fixed laws was not in the Charter] all civil officers within the said Commonwealth, [Province,] the election and constitution of whom are not hereafter in this form of government otherwise provided for, [in the Charter, not reserved to the King, or to the Governor,] and to set forth the several duties, powers and limits of the several civil and military

officers of this Commonwealth," [in the Charter, of all appointed by the General Court.] Constitution of Massachusetts, c. 1, § 1, art 4. Anc. Chart. 32, 33.

And it has always been the practice of the Legislature of the Commonwealth, at their discretion, to create new judicatories, other than the Supreme Judicial Court, to transfer jurisdiction from one to another, in whole or in part, and to abolish any inferior court and substitute another in its place, or permit its powers and duties to revest in the tribunal to which they belonged before the former court was created. The action of the Legislature with regard to the two principal inferior courts of the Commonwealth, the Court of Common Pleas, and the Court of Sessions, both mentioned in the Constitution, affords sufficient examples of the exercise of this power.

In 1782, a Court of Common Pleas was established in each county, with civil jurisdiction only, to which, in 1804, all the criminal jurisdiction of the Court of Sessions was added. The county Courts of Common Pleas, each of which consisted of four, and afterwards of three judges, were superseded, in 1811, by Circuit Courts of Common Pleas, of only three judges each, though each circuit consisted of several counties. In 1814, a Boston Court of Common Pleas was established, vested with all the jurisdiction, and the judge of which was to receive all the fees, of the former Courts of Common Pleas in the county of Suffolk. And in 1821, all former acts concerning Courts of Common Pleas were repealed, and a Court of Common Pleas for the Commonwealth established, to consist of four judges; which court, with an occasional increase in the number of judges, has continued to this day, except in Suffolk, where it has recently been superseded in its turn by the present Superior Court of that county. Sts. 1782, c. 11; 1803, c. 155; 1811, c. 33; 1813, c. 173; 1820, c. 79; 1855, c. 449.

The changes in the Court of Sessions were still more frequent. Justices of these courts were first provided for by acts of 1807 and 1808, the courts having been previously held by the Justices of the Peace of the county. In 1809, those acts were repealed, and all the powers and duties of the Court of Sessions transferred to the Court of Common Pleas. The Courts of Sessions were revived in 1811; again abolished in all the counties except Suffolk,

Nantucket and Dukes County, in 1814, and reëstablished in 1819; abolished in Suffolk in 1821; part of their jurisdiction transferred to Commissioners of Highways, in 1826; and finally abolished throughout the Commonwealth, together with the Commissioners of Highways, in 1827, and the duties of both transferred to County Commissioners, by whom, under various modes of appointment and election, they have since been performed. Sts. 1807, cc. 11, 57; 1809, c. 18; 1811, c. 81; 1813, c. 197; 1818, c. 120; 1821, c. 109; 1825, c. 171; 1827, c. 77; 1835, c. 152; 1854, c. 77. Rev. Sts. c. 14, §§ 16 & *seq.*

These changes, though many of them necessarily took away all the powers, jurisdiction, duties and compensation of the justices of the courts thus abolished, have been generally acquiesced in, and repeatedly recognized as legal by the Supreme Judicial Court. *Wales* v. *Belcher*, 3 Pick. 510. *Taft* v. *Adams*, 3 Gray, 130. *Dearborn* v. *Ames*, Suffolk, March term, 1857.

The provisions of the Constitution of the United States hardly differ in substance from those of the Constitution of Massachusetts, upon this matter, except in providing for a fixed compensation for the judges of the inferior courts. But as the United States, under the Confederation, had no national judiciary system whatever, the framers of that constitution, unfettered by the time-honored words of previous charters or laws, were enabled to express their meaning more briefly.

The only clauses of the Constitution of the United States, which bear upon the question, are the following: "The judicial power of the United States shall be vested in one Supreme Court, and in such inferior courts as the Congress may, from time to time, order and establish. The judges, both of the supreme and inferior courts, shall hold their offices during good behavior, and shall, at stated times, receive for their services a compensation, which shall not be diminished during their continuance in office." Art. 3, § 1. "The Congress shall have power to constitute tribunals inferior to the Supreme Court." Art. 1, § 8.

That the "one Supreme Court," thus established, is necessarily permanent, has never been doubted. But the question of the extent of the power of Congress over inferior courts arose within fifteen years after the Constitution of the United States took effect. By the original Judiciary Act of 1789, Circuit Courts were erected, to "consist" of

any two judges of the Supreme Court, and the district judge of the district. 1 U. S. Sts. at Large, 74, 75. By the act of February 13th, 1801, these Circuit Courts were abolished, and their jurisdiction transferred to new Circuit Courts, to be held by judges to be specially appointed for the purpose, and who were appointed accordingly. 2 U. S. Sts. at Large, 90, 98. By the act of March 8th, 1802, this act was repealed, the new judges thus deprived of their offices, and the old Circuit Courts re-established. 2 U. S. Sts. at Large, 132. The constitutionality of the repealing act was debated with great thoroughness and ability on both sides in the Congress which passed it, and was strongly denied by a very large proportion of the federal party of that day, and by some eminent jurists since. Yet the fact that not one of all the federalist judges removed was bold enough to try his right before the Supreme Court of the United States, although the members of that court were then men of similar political views, may well create a doubt whether the federalists themselves had much confidence in their position, upon the mere question of power, apart from considerations of the wisdom or motives of the change. And the universal acquiescence in the act, after its passage and ever since, is conclusive of its validity, if any effect be given to the principle on which the Supreme Court of the United States held, in 1803, that it was even then too late to question the right of the Judges of the Supreme Court to sit as circuit judges without being commissioned as such. *Stuart* v. *Laird*, 1 Cranch, 299.*

This question of the power of the Legislature has been much discussed in connection with the recent Massachusetts statute of March 26th, 1858, (St. 1858, c. 93,) entitled "An Act to change the jurisdiction in matters of Probate and

* It would appear from a representation said to have been drawn up by Chief Justice Jay in answer to a letter from President Washington, and published in 4 American Jurist, 295, and thence copied in a note to Story on the Constitution, § 1579, that a minority of the Supreme Court were originally of opinion that Congress had no power to require the judges of that court to hold circuit courts, for two reasons: because their jurisdiction must by the Constitution be appellate only; and because all judges could be appointed only by the President and Senate. It is much to be regretted that no evidence is furnished, in either of these works, of the authenticity of this paper. But that it was never communicated to the President is implied from the statement prefixed to it in the Jurist, and put almost beyond a doubt by the want of any allusion to it in 1 Jay's Life and Writings, 276, where his holding of circuit courts is mentioned, and in 10 Washington's Writings, 86, where the letter from the President is printed; and by the language of the Supreme Court in *Stuart* v. *Laird*. "To this objection, which is of recent date, it is sufficient to observe, that practice and acquiescence under it for a period of several years, commencing with the organization of the judicial system, affords an irresistible answer, and has indeed fixed the construction." 1 Cranch, 309.

Insolvency," by which "the office of the Judge of Probate of wills and for granting letters of administration, and the office of Judge of the Court of Insolvency, as the same are now established by law, in each of the respective counties of the Commonwealth, are abolished;" and all their jurisdiction and authority are transferred to a "Judge of Probate and Insolvency," to be appointed in each county.

In the Province Charter of 1691, the probate jurisdiction, which was derived from the civil law, was separated from the common law jurisdiction, by authorizing the Governor and Council to "do, execute or perform all that is necessary for the probate of wills, and granting of administrations for, touching or concerning any interests or estate which any person or persons shall have within our said province or territory." Anc. Chart. 32. In the exercise of the authority so conferred, the Governor appointed, as his deputies or surrogates, Judges of Probate in each county, who had not even the seal and forms of a judicial tribunal, but from whom an appeal lay to the Governor and Council. An act, passed by the Provincial Legislature, to establish county courts of probate, was negatived by the King; and no statute, establishing such courts, or providing for the appointment of judges or registers of probate, existed until after the adoption of the Constitution. Parsons, C. J., in *Wales* v. *Willard*, 2 Mass. 124. Shaw, C. J., in *Peters* v. *Peters*, 8 Cush. 541.

Only twenty years before the adoption of the Constitution, Governor Pownall, in a communication laid before "a Court of Probate held by the Governor, with the Council or Assistants, at the council chamber in Boston, on the 9th day of February, A. D. 1760," said: "It is a civil law court. This idea will not only point out what ought to be the rules or practice of this court; but from this alone can its present method of administration be accounted for. No common law court has a power of substitution; no law of the Province established the court of the county judges of probate, though many laws recognize them as constituted. This power of substitution or delegation is incidental to every civil law judge, and this incidental right is specially mentioned in the charter by the words *all that is necessary thereto.* The wisdom therefore of our predecessors has, from this idea, understanding the power they were vested with by this grant of a civil law jurisdiction, delegated or substituted

judges of probates in the several counties, who are thereby inferior civil law courts for distinct peculiars, and subsist by a delegation of power to judge in the first instance, from whom lies an appeal to the Governor with the Council or Assistants as the Superior Court of the Province for such matters." And pursuant to the recommendation of the Governor, the Council then for the first time passed orders for the appointment of a register of the Supreme Court of Probate; for the recording of probate matters in a separate book from the other doings of the Governor and Council; establishing regular terms and a seal for the Supreme Court of Probate; and regulating appeals from the Judges of Probate. But although the Governor "observed that there still remained to be considered these two points, namely: 1st. What rules or orders are to be observed by this court in its juridical capacity? 2d. In what method the exercise of its jurisdiction may be carried into execution?" and these matters were referred to the same committee which had reported the other orders, it does not appear by the records of the Supreme Court of Probate, (which are preserved in the office of the clerk of the Supreme Judicial Court of the county of Suffolk, and from which the above is taken,) that any further orders were passed relating to the practice in probate proceedings.

At the time of the adoption of the Constitution of Massachusetts, therefore, the original jurisdiction in matters of probate was exercised by mere deputies of the Governor and Council, holding by no judicial tenure; and the appellate jurisdiction was vested, not in any court of judicature, but in the Governor and Council. And these facts should be borne in mind in interpreting the clauses of the Constitution in which Judges of Probate are mentioned, and especially in determining whether the Constitution invests their courts with a sacredness which belongs to no other tribunal except the Supreme Court.

The Constitution does, indeed, ordain that "the Judges of Probate of wills, and for granting letters of administration, shall hold their courts at such place or places, on fixed days, as the convenience of the people shall require." c. 3, art. 4. But the avowed purpose of this provision is not to establish a particular set of judges, but merely (in the spirit of the Province law of 1719, Anc. Chart, 427,) to secure to the people of the Commonwealth

easy and certain access to the only courts under whose jurisdiction the family and creditors of every citizen of any property must some time come. And, as if to preclude the supposition that this security for the convenience of the people could exempt these judges in any degree from legislative control, it is immediately added: "And the Legislature shall from time to time hereafter appoint such times and places; until which appointments, the said courts shall be holden at the times and places which the respective judges shall direct."

Then comes the clause that "all appeals from the Judges of Probate shall be heard and determined by the Governor and Council, until the Legislature shall, by law, make other provision;" c. 3, art. 5. This provision, also, was not new, but merely continued in force that part of the Province Charter, until the Legislature should have opportunity to consider and act upon it. It left the appellate probate jurisdiction, where it found it, in the Governor and Council, thus making the Supreme Court of Probate to consist of officers elected annually by the people; and submitted the question of the erection of a new Supreme Court of Probate entirely to the discretion of the Legislature. Surely, this clause carries with it no very strong implication that the inferior courts of probate are beyond the reach of the Legislature.

Courts of Probate were not, in fact, established under the Constitution, until 1784, when the Legislature passed an act establishing a Probate Court in each county of the Commonwealth, defining their jurisdiction, and making the Supreme Judicial Court the Supreme Court of Probate. St. 1783, c. 46.

The only other articles of the Constitution, which mention Judges of Probate, are those relating to the incompatibility of certain offices, c. 6, § 2; amendments, art. 8. But as these mention in like manner the Court of Common Pleas, and the Court of Sessions, they can hardly, after what we have seen of the legislation with regard to those courts, add much weight to the position of Judges of Probate.

The validity of that part of the act of 1858 which abolishes the office of Judge of Insolvency is unquestionable; for those judges are not even named in the Constitution. And any doubt remaining as to the entire consti-

tutionality of the act, as applied both to Judges of Probate and to Judges of Insolvency, must be dispelled by a consideration of the precedent of the Court of Insolvency itself.

The nineteenth article of amendment of the Constitution of Massachusetts, which was adopted by the people on the 23d of May, 1855, declared: "The Legislature shall prescribe, by general law, for the election of Commissioners of Insolvency by the people of the several counties, for such term of office as the Legislature shall prescribe." And, in obedience to this direction, the Legislature, on the 16th of May, 1856, provided for the election of Commissioners of Insolvency by the people of each county, to hold office for three years. St. 1856, c. 173. By another act, passed only three weeks later, the same Legislature transferred all the jurisdiction, power and authority of Commissioners of Insolvency to Judges of Courts of Insolvency, thereby first established, which judges were to be appointed by the Governor, and hold during good behavior. St. 1856, c. 284. This act was approved by the Governor, and judges appointed accordingly. And the Supreme Judicial Court, in the case of *Dearborn* v. *Ames*, argued and determined in Suffolk, March term, 1857, as well as in an opinion given to the Senate about the same time, held that this act was constitutional and valid.

That amendment of the Constitution not only mentioned the officers in question by a name which of itself implied, necessarily, and to the understanding of the public, the jurisdiction over proceedings in insolvency; but in terms declared that "Commissioners of Insolvency" should be elected by the people; and the Legislature had provided for such election, and fixed their term of office. Yet an act was passed by the Legislature, signed by the Governor, and held valid by the Supreme Judicial Court, which not only put an end to all the powers and jurisdiction, and consequently to all the compensation, of Commissioners of Insolvency, but was open to the additional serious objection of conferring those powers and jurisdiction, with a more certain compensation for their exercise, on officers not elected by the people, nor responsible directly to them. And the principal reason assigned by the Supreme Court, for not allowing to that amendment of the Constitution the effect of perpetuating the office of Commis-

sioner of Insolvency; or even of securing the continuance of its power and jurisdiction, being partly judicial in their nature, in officers elected in the same manner; was that such a construction would be inconsistent with the general powers granted to the Legislature to establish judicatories and set forth the powers and duties of officers.

The theory of the Constitutions of the United States and of this Commonwealth, on this subject, may be briefly stated thus: The Supreme Court, vested with the ultimate power of determining all questions of law, including the very delicate duty of even setting aside an act of the Legislature when contrary to the Constitution, is a necessary part of the government of any country which has a written constitution, limiting the lawmaking power, and creating distinct judiciary and legislative departments; and must, therefore, be established by the Constitution itself, and put beyond legislative control. But what inferior courts and magistrates may be requisite to administer and interpret the laws, cannot well be foreseen, and must be left to the discretion of the Legislature to judge, as circumstances may demand. And, although it is well that the judges of the inferior courts also should hold their offices during good behavior, so long as the public advantage may require the continuance of their offices, an irrevocable establishment of their offices is not of at all the same importance as those of the supreme judges; and, if made, would effectually prevent any complete amendment of the judiciary system, even when it should become clear that the established organization did not meet the wants of the public.

Both these Constitutions, therefore, recognize the power to organize and re-organize inferior courts, as an essential and inalienable attribute of the Legislature. For this purpose, "the General Court shall *forever* have full power and authority to erect and constitute judicatories and courts of record." And Congress is not only vested, in the same clause which confers upon it other general legislative powers, with that "to constitute tribunals inferior to the Supreme Court;" but the inferior courts, in whom part of the judicial power is to vest, are "such as the Congress may, *from time to time*, order and establish."

The practical rule, which governs the whole subject, is that every court may be abolished by the power which

established it, but not by any lower power. *Cujus est instituere, ejus est abrogare.* The Supreme Court, therefore, established by the people in their Constitution, as a necessary part of the frame of government, can be reached only by an amendment of the Constitution. But all inferior courts, being but the creatures of the Legislature, may be abolished by the same power which created them.

Circuit Court of the United States. New Hampshire. May Term, 1857.

LINDSEY JORDAN AND AL. *v.* THE UNION MUTUAL FIRE INSURANCE CO.

Under the charter of the defendant corporation, it was the duty of the directors, on being notified of the occurrence of a loss, to assess upon the signers of the deposit notes, liable thereto, a sum sufficient to meet the same.

Held, that if the validity of the claim is denied and litigated, the necessity of an assessment is not superseded, but merely suspended, and if policies expire which were running when the loss occurred and was duly notified, the directors have no right to surrender the deposit notes thereof, without providing for the contingency of the validity of the litigated claims.

If a judgment is eventually recovered, the omission by the directors to make, if necessary, a special assessment for the payment thereof, will render them personally liable for such an amount towards the judgment as an assessment, seasonably made, and enforced with due diligence, would have procured.

CURTIS, J.—The directors of this corporation were trustees, primarily for the corporation, but also for the individual members; and if they have illegally neglected and refused to exercise their powers, and such neglect and refusal has inflicted a special injury on an individual member, he may have the appropriate relief in a court of equity. *Dodge* v. *Woolsey*, 18 How. 331.

Under the charter of this corporation, it was the duty of the directors to assess upon the signers of the deposit notes of the fourth class, whose policies were in existence when the plaintiffs loss happened, and was duly notified to the company, a sum sufficient to pay that loss. This duty was not finally superseded by the refusal of the directors to admit the validity of the plaintiffs claim. In the fair

exercise of a sound discretion, the directors might rightfully omit to make an assessment to pay a loss which they thought not justly payable, until it should be decided either by arbitrators or a court of law, whether the claim was valid. But such refusal merely suspends the assessment until the necessity for it is conclusively ascertained. The directors cannot, by refusing to pay a loss, acquire the power to destroy or diminish the fund out of which the claimant is to be paid provided his claim prove valid. And if policies expire which were running when the loss occurred and was duly notified to the company, the directors are bound to consider the claim for a loss, though litigated, as a contingent charge on the deposits made under such expired policies, and have no right to surrender the deposit notes without providing for such contingency.

The defendants admit that they have not exercised their power to make an assessment to pay the loss due to the complainants, and they assign the following reasons for the omission:

"And these defendants further answering say, that upon the rendition of said final judgment against said company, the directors of said company, for the time being, did not make an assessment upon the deposit notes liable to be assessed for the payment of the amount of said judgment, because there was then due to said company and asssessed upon premium notes liable to be assessed for the payment of said loss of said complainants, a sum much greater than was necessary for the payment and discharge of said judgment; and the said directors hoped and believed that from the balance thus due, and assessed upon said notes at the time of the rendition of said judgment, a sum might be collected sufficient to pay and satisfy said judgment."

"And these defendants, Treadwell, Chandler, Fowler and Lang say, and these defendants, Gass, Carter and Stevens say, that they are informed and believe it to be true that the directors of said company have made all reasonable endeavors by suit and otherwise, to collect the same, but their efforts in this respect have been almost entirely unsuccessful. And although the said directors still retain in the hands of the treasurer of said company, a large amount of deposit notes liable to be assessed for the payment of said judgment, to wit, notes amounting in all to the sum of forty-two thousand three hundred and forty-eight dollars

and forty-two cents, included in which amount is the premium note of these complainants for the sum of one hundred and seventy-six dollars, they have hitherto neglected to order an assessment thereon, for the payment of said judgment, because the said directors had good reason to believe that it would be utterly impracticable to enforce the collection of said assessments, in consequence of the makers of said notes having so long ceased to be members of said company by being insured therein, and being so scattered abroad throughout all the New England States, and for the further reasons that very many of said makers were insolvent, had deceased, or had gone to parts unknown."

"Under these circumstances, these defendants say that they did not believe any further assessment practicable, the said directors not conceiving themselves justified in making, or required as directors to make an assessment which they did not believe could be made available. But the said defendants, directors, say, and the said Lang saith, that he is informed and believes that the said directors upon notice of the rendition of said final judgment against said company, informed the said complainants that a special assessment upon the notes liable to pay said judgment, might be made if said complainants desired it, and the treasurer of said company directed to pay over to said complainants such sums as he might collect of the same; but said complainants did not signify their desire that such course should be pursued by said directors."

I am of opinion that upon the proofs in this case, neither of these grounds of defence is made out.

If, when the plaintiffs judgment was recovered, an assessment adequate in amount to pay it, and which the directors believed would be available to pay it, had already been laid, they were not obliged to do more until they found such assessment would not be available for that purpose. When they did discover its inadequacy, they were bound to make a special assessment in behalf of the plaintiff. When this discovery was made, is not stated. They say their efforts "have been almost entirely unsuccessful." If they have collected any amount, why was it not appropriated towards satisfying the plaintiffs judgment?

But further; these grounds now assumed in the answer are not consistent with the letter written by the president

to Mr. Cozzens, in answer to his notice of the recovery of the judgment. That letter was as follows:

Office Union M. Fire Ins. Co.,
Concord, N. H., Oct. 11, 1855.

Benj. Cozzens, Esq.,—Sir: In reply to yours of yesterday, addressed to Mr. Lang, I will say that for the loss of Lindsey Jordan & Co., the directors of this company, believing they had no legal or just claim against it, have never ordered an assessment for that loss. The fire, for which they claim damages, occurred Jan'y 8th, 1851. All insurances in the class in which Jordan & Co. were insured run for three years; and all the policies then existing, and liable for this loss, expired in Jan'y 16, 1854. Most of the premium notes on these policies liable to be assessed, have been settled and given up to the signers—a very few of the unsettled ones remain with the company, among which is that of Jordan & Co., for $176. These are the only notes that could now be assessed to pay this loss. How much might be realized from an assessment on them, I am unable to say; but little or much, they are the only means of the company responsible for this claim.

I have thus frankly stated to you the means of the company, applicable to this loss.

Yours, &c., THS. P. TREADWELL.

Surely, if an assessment had then been laid, which the directors expected would afford the means to pay the judgment, that was the proper time to say so. Instead of that, the president says, in effect, there are no considerable means of payment applicable to that demand.

Nor do I think it is true that the sum of $\$42{,}348\frac{42}{100}$, which the answer admits was liable to assessment, was wholly unavailable for the plaintiffs benefit, or ought to have been so treated by the directors. Precisely how much was thus available, is the proper subject of inquiry by a master. But the proofs satisfy me that enough of this fund was available, and ought to have been known to the directors to be so, to make it their clear duty to make an assessment in behalf of the plaintiffs.

Nor does it appear that they waived their right to an assessment. If they had done so, it would have been difficult to have allowed the defendants the benefit of such waiver, because the president's letter of the 11th October,

already quoted, did not contain a fair statement of the condition and amount of the means of the company applicable to the payment of the plaintiffs' judgment. It represents a state of things materially different from that disclosed in the answer; and still more unlike that shown by the proofs.

I think the omission of the defendants to make an assessment for the payment of the plaintiffs judgment, was the neglect of a plain duty, which has rendered them personally liable for such an amount of money towards the payment of that judgment, as an assessment, seasonably made, and enforced with due diligence, would have procured.

Let a decree be drawn up referring the cause to a master, to inquire and report what sum, applicable to the payment of the plaintiffs loss, might, and with the use of due diligence would, thus have been raised. And in taking this account, the master is to include notes applicable to the payment of the plaintiffs loss at the time when it occurred and was duly notified to the company, though such notes have been surrendered by the defendants, unless such surrender was made in the fair exercise of discretion, with a view to obtain all that could by due diligence be obtained from such notes.

Circuit Court of the United States. Massachusetts District. May Term, 1857.

THE SCHOONER JOHN PERKINS.

The act of cutting the cable of a vessel at anchor, done by one of her crew in order to avoid an impending collision with a vessel adrift, does not amount to a salvage service rendered to the latter vessel, although she may have been preserved from destruction thereby.

A vessel enclosed in the ice in Boston Harbor was deserted, during a gale, by all her crew, save one who remained because he thought it less dangerous for him, than to attempt to reach the shore. The others intended to return when the gale should abate: *Held*, that none of the crew were absolved from their contract or duty to the ship, and consequently that no exertions for the safety of the vessel by the seaman who remained on board could constitute him a salvor thereof.

Where officers and crew properly leave a vessel to save their lives, so that the anchors cannot be used, and the ship then drifts into collision with another, it is a case of misfortune without fault, in which each vessel bears its own loss.

A voluntary sacrifice, such as cutting a cable, made by one vessel to avoid an apprehended collision with another vessel, is not a case to which the law of contribution by general average, can be extended.

The facts of this case are sufficiently shown in the opin-

ion of Ware, J. in the District Court, reported 19 Law Reporter 490, and in the opinion in this case by

CURTIS, J.—This is an appeal from a decree of the District Court in a cause of salvage. The libel was filed by Nickerson, one of the crew of a fishing schooner called the Wyvern for himself, and by Thomas Lewis, master of the Wyvern, in behalf of the owners, officers, and crew of that vessel. It appears from the pleadings and proofs that during the severely cold weather of the month of February, 1856, the John Perkins, the Wyvern, and two other vessels were accidentally enclosed in a large field of ice, which extended along the shores of Massachusetts Bay, and continued to make until their immediate escape became impossible. Though the vessels were embedded, the field of ice was moved by the wind and sea. In this condition these vessels remained for several days, drifting helplessly with the field of ice, which was constantly becoming thicker and more dangerous by the piling of masses on each other, which the intense cold at once rendered solid. The crews became alarmed for their own safety. On Saturday, the 11th of February, the crew of the Wyvern, with the exception of Nickerson, the libellant, left her and went on shore over the ice. Nickerson thought this attempt more dangerous to him than it was to remain on board, and he therefore remained. About noon of Sunday, the 19th, the crew of the John Perkins left her and went first on board the Acorn, a steamer which was one of the vessels enclosed, and during the afternoon went on shore, together with the crews of the two other vessels, deeming it too hazardous to life to remain. The wind was blowing a gale, and there can be no doubt that the condition of all the vessels was one of extreme peril.

The libel pleads that at about half-past eleven o'clock of the night of Sunday, Nickerson discovered the John Perkins drifting directly towards the Wyvern, which had one anchor down; that to prevent a collision and the destruction of both vessels, Nickerson cut the cable of the Wyvern, and thus prevented the destruction of both vessels. And it is for this act salvage is claimed. There is very great conflict in the testimony respecting the danger of a collision between the John Perkins and the Wyvern. But I do not deem it necessary to pronounce any opinion upon

it; for I think the act alleged to have been done, did not amount to a salvage service rendered to the John Perkins.

I cannot distinguish this case from that of the *Mazurka*, decided by this court in 1854, 2 Curtis's C. C. R. 78. In that case two vessels were at anchor inside the breakwater in Delaware Bay. In a gale of wind the Mazurka drifted, dragging her anchors, and came in collision with the Sarah Adeline, whose master, to avoid the destruction of both, slipped her cable, tried to hold on with her small anchor and kedge, but went ashore. It was held that as the two vessels were subject to a common peril which threatened the immediate destruction of both; and, as the master of the Sarah Adeline found he could not otherwise release his vessel, it was his imperative duty to slip his cable to save his own vessel and the lives of the crew; that this could not be deemed such a voluntary interposition to save the property of another, by one under no legal obligation to interpose, as to constitute a claim for salvage. I am satisfied of the correctness of that decision.

As was observed by Sir John Nichol in the Calypso, 2 Hagg. 217, both civil and military salvage resolve themselves into the equity of rewarding spontaneous services rendered in the protection of the lives and property of others. However others may incidentally profit by an act, if it was done not for the purpose of benefitting others, but to save property under the charge and protection of the actor, he was legally bound by his contract to do all which was done for the preservation of the property under his charge, and it cannot be treated by a Court of Admiralty as a spontaneous service, and cannot found a claim to a salvage compensation. When vessels are entangled by a collision, it is not unfrequently necessary, voluntarily, to destroy parts of their rigging, or spars, or both, to enable them to separate. Such damages receive their character from the character of the collision, and are apportioned, or paid for by the wrong doer, or borne by the party on whom they fall, according to the existence or absence of fault. Such sacrifices do not constitute a claim for salvage, though the acts done may sometimes involve personal danger, and may relieve both vessels from otherwise certain destruction. And I can perceive no sufficient reason why sacrifices necessarily made to avoid a collision, should not fall within the same rule. But it is insisted that the libellant stood on such a relation

to the Wyvern that he could be a salvor of that vessel as well as of the John Perkins; and that having rendered assistance whereby both vessels were relieved from peril, he may well be considered the salvor of each. This position requires examination; for if a mere stranger, under no duty by contract or otherwise, renders assistance upon the sea, by means of which two vessels are prevented from destroying each other, no reason is perceived why he may not claim a salvage compensation from each.

In this case, Nickerson was one of the crew of the Wyvern. It is laid down by numerous authorities, and is undoubtedly a part of our maritime law, that seamen are bound by their contract to exert themselves to the utmost to save the vessel and cargo from peril. Abbott on Shipp. part V. ch. II. sec. 2, p. 751, 6th Am. Ed. *The Two Catherines*, 2 Mason 337. *Pitman* v. *Hooper*, 3 Sumner 50. *The Dawn*, Daveis's R. 137. *The Massasoit*, 7 Law Reporter 522. *Nesner* v. *The Suffolk Bank*, 1 Law Reporter 249. And while that contract subsists and is operative, services rendered by them in saving another vessel, or cargo, or both, being due by force of their contract, will not enable them to claim as salvors.

In the case of the *Neptune*, (1 Hagg. 236,) Lord Stowell said: "The doctrine of this court is justly stated by Mr. Holt — that the crew of a ship cannot be considered as salvors. What is a salvor? A person who without any particular relation to a ship in distress, proffers useful service, and gives it as a volunteer adventurer, without any pre-existing covenant that connected him with the duty of employing himself for the preservation of that ship: not so the crew, whose stipulated duty it is, (to be compensated by payment of wages,) to protect that ship through all perils, and whose entire possible service for this purpose is pledged to that extent."

In *Hobart* v. *Drogan*, 10 Peters 122, Mr. Justice Story in delivering the opinion of the Supreme Court, after saying it is laid down by Lord Stowell, that the crew of a ship cannot be considered salvors, quotes the above definition of a salvor, and uses the following language, "And it must be admitted, that, however harsh the rule may seem to be in its actual application to particular cases, it is well founded in public policy, and strikes at the root of those temptations which might otherwise exist to an alarming extent, to in-

duce pilots and others to abandon their proper duty, that they might profit by the distress of the ship which they were bound to navigate." This definition of Lord Stowell in the case of the *Neptune*, and its consequence that seamen cannot be salvors of their own vessel, had previously received the sanction of Mr. Justice Thompson, in the case of the *Wave*, in an elaborate opinion, not reported when *Hobart* v. *Drogan* was decided, but now contained in the second volume of Paines' Circuit Court Reports, p. 131, published in 1856.

It is true there is a class of cases in which seamen have been considered entitled, in case of shipwreck, to recover their wages out of the proceeds of the wreck saved by them; and in some cases, where the disaster occurred in a foreign country, an additional amount to pay the expense of their return home. See *The Dawn*, Daveis's Rep. 121, where the authorities are elaborately examined. And in some of these cases it was considered that this claim of the seamen was in the nature of a claim for salvage. Mr. Justice Story so considered in the case of the *Two Catherines*. In his note to Abbott on Shipp. Part V. Ch. II. sec. 2, p. 753, he says: "Lord Stowell, in the case of the *Neptune*, 1 Hagg. 227, puts the case of shipwreck as an exception to the rule, as to the earning of freight being a preliminary to the payment of wages, and so it was intimated in the *Two Catherines*, 2 Mason 319, 334, the doctrine ought to be; but the court then thought the rule upon the authorities had not been construed as liable to such an exception, and therefore put the allowance of wages in case of shipwreck upon grounds of a qualified salvage." I infer from this passage, as well as from what he said in the *Hobart* v. *Drogan*, and *Pitman* v. *Hooper*, that if the case of the *Neptune* had been before him, when he decided the case of the *Two Catherines*, he would have placed that decision upon the same exception asserted by Lord Stowell, and not upon a claim to a qualified salvage.

More recently, Judge Sprague in the District Court for the District of Massachusetts, after a careful examination of the authorities, has held that wages, as such, by operation of the contract, and not by way of salvage, are recoverable in cases of shipwreck, if the crew either assisted or were ready to assist in saving the vessel. *The Massasoit*, 7 Law Reporter, 522.

It being perfectly settled that the seamen are entitled to recover in such a case, and also that the quantum of their claim is fixed by the amount of wages due, adding perhaps the expense of their return, it does not appear to me intrinsically important, whether such an allowance is denominated a *quasi* salvage compensation, or held recoverable solely under the contract. If salvage, it is so qualified that its compensation is limited to the specific allowance growing out of, and due under the contract, as that is interpreted by the maritime law, and the right to such allowance does not change or trench upon the settled rule that a seaman acting under a subsisting contract has no standing in a Court of Admiralty as a salvor of his own vessel. Undoubtedly, when the contract ceases to be binding on the seaman, even if the voyage has not been completed, he may then become a salvor. Such was the case of the *Blaireau*, 2 Cranch, 268. And, as was said by Lord Stowell, in the *Neptune*, and is repeated in *Hobart* v. *Drogan*, it may be possible that a seaman may render a service exceeding the duty which he owes by his contract and become a salvor. But so far as I know, no such case has ever been presented to a court in England or in this country.

The case of *Nesner* v. *The Suffolk Bank*, decided by Judge Davis, in this District, in 1838, and reported in 1 Law Reporter, 249, would seem to have involved all the considerations in favor of the claim of one of the ship's company to be a salvor, which could well be presented. The steamer New England bound from Boston to ports in the State of Maine, came in collision with a sailing vessel in the night time; a large hole was made in the bow of the steamer, which immediately began to fill. The passengers and crew took refuge on board the sailing vessel, which was not seriously injured. The master and some of the crew of the steamer got one of its boats and lay by in it, at a prudent distance. In this state of things, and while the steamer was rapidly filling with water, the libellant, who was the engineer of the steamer, took an axe, boarded the steamer, cut a hole in the promenade deck over the captain's office, and by great personal exertion rescued a package of bank bills, amounting to the sum of $46,000, which belonged to the defendants, and restored them to the custody of the defendants agent, who was a passenger on board. The libellant acted, not on any order of the master, but upon an offer

of a liberal reward made by the agent, whose authority to make the offer the defendants denied. And when he finally left the steamer, the water was already over the guards, and she sunk within a few minutes. I was of counsel for the libellant, and pressed the points, that it was admitted contingencies might occur, in which one of the ship's company could be a salvor; that in this case the property saved had been abandoned by the officers and crew of the steamer, and without the gallant and successful effort of the libellant, must have immediately perished; that the libellant being the engineer of the steamer had no duty to perform save to manage and take care of the machinery of the boat; that his duties under his contract terminated when the steamer was finally abandoned as unnavigable; and that what he did was beyond the line of his duty and entitled him to claim as a salvor.

But Judge Davis, whose experience in the administration of the maritime law, as well as the soundness of his judgment and his careful research, will cause his decisions to be long remembered here with respect, and whose inclinations to uphold the rights of seamen, with a strong hand, were never doubtful, dismissed the libel. I advised an appeal; for I was desirous of obtaining the opinion of my eminent predecessor, whose views in the case of the *Two Catharines* had been strongly pressed on Judge Davis; but my client was not willing to appeal. Though I am not prepared to deny that cases may arise in which the crew may become salvors of the vessel, it is not easy for me to foresee how such a case can arise, while their contract continues in force.

The degree of distress certainly does not change the character of the service; and if the amount of personal exertion and hazard, incurred in preserving the property, can change the character of the service, what becomes of the rule of the maritime law, under which, as Lord Stowell says, "it is the stipulated duty of the crew, (to be compensated by payment of wages,) to protect that ship through all perils, and whose entire possible service for this purpose is pledged to that extent," and how, as Mr. Justice Thompson asks in the case of the *Wave*, 2 Paine C. C. R. 147, can we fix the point at which seamen may withdraw their services as seamen, under their contract, and set themselves up as salvors. No doubt a seaman must some-

times judge for himself, whether he will or will not do an act to save life or property. The peril may possibly be so great, as to justify his refusal, even if ordered by the master to do it. But however great it may be, if he choose to encounter it to guard the vessel from destruction, he must be deemed to be acting under his contract, and in the gallant discharge of his duty, and not as a salvor.

I come now to the application of these principles to the facts of this case.

The libellant voluntarily remained on board the Wyvern when the rest of the ship's company went on shore, simply, as he admits, because he considered it more dangerous for him to go, than to remain.

Though the master and crew of the Wyvern temporarily left the vessel under the pressure of the danger arising from the force of the wind, it was their intention to return on board when the gale should have abated; and though they undoubtedly considered the danger imminent, there is no reason to say, upon the evidence, they thought the condition of the vessel hopeless. They not only intended to return, but expected to return. And they at no time were far enough distant to lose sight of the vessel in the day time, or to be unable to return promptly, when the gale should abate. This was, therefore, not a case of a derelict vessel, nor were those of the crew who went on shore, or the libellant who remained on board, absolved from their duties as seamen; the latter to do any thing which he might find practicable for the safety of the vessel while he remained on board, and the former to return on board and continue their voyage, when circumstances should permit and the master require them to do so. *Clarke* v. *The Dodge*, Healy, 4 Wash. C. C. R. 651. *The Emulous*, 1 Sumn. 207. *The Elizabeth and Jane*, Ware, 41, 43. *The Aguila*, 1 Rob. 39.

I can see no ground for saying his relation to the vessel was dissolved, or the duties growing out of that relation terminated; nor was it so considered in the court below. It is not pleaded in the libel nor shown by the proofs that he was in any way absolved from the obligation which he was under as one of the crew of the Wyvern, to cut her cable when he found that was the only means of preserving her from destruction. I cannot treat him therefore as a stranger to both vessels and capable of rendering a sal-

vage service to both; but only as one of the crew of the Wyvern, voluntarily on board, and bound by his contract to act, as he did act, for the preservation of the vessel under his charge. And his claim for salvage must be rejected.

Without intending to express any opinion upon the questions, whether the libellant did in fact render the service alleged, or whether there was danger of a collision, such as is alleged, it is not unimportant to remark that the proof of the asserted service, and of its necessity, is derived solely from the libellant himself, and that there is no small difficulty, upon the proofs, in determining whether his statements on these essential points are true.

When strangers interpose to save property, if it is derelict, there can hardly be a case in which it is doubtful whether a salvage service has been performed; if still in the custody of the ship's company, or some of them, they may be relied on as disinterested witnesses to describe the material facts. But if the crew, or individuals of them, may become salvors, the owners, as in this case, may have no protection, arising from the presence of those to whose charge they committed their property, since these are the very persons setting up the hostile claim, and, in the absence of all other evidence, proving, by their own testimony, the necessity for, and the rendition of the service. The temptations which may arise from such exposure, may afford an additional proof of the wisdom of the rule, that the crew of a vessel cannot be its salvors.

But it is further insisted on behalf of the owners of the Wyvern, that the John Perkins was in fault for drifting towards the Wyvern and rendering it necessary to cut her cable, and so there is a valid claim for damages in the loss of the cable and anchor.

Upon the evidence before me, I should find it difficult to come to the conclusion that, if the crew of the John Perkins had remained on board, they could have prevented that vessel from drifting, save by letting go their anchors and thus subjecting their vessel to the imminent hazard, not to say the certainty of being destroyed by the moving field of ice.

But if this were not so, I should still be unable to say that the absence of the crew was any fault on their part. They left for the shore to save their lives from imminent danger, and were justified in doing so. And I do not think their vessel can be treated as guilty of a tort, when its

navigators were in no wrong. The same *vis major* which drove them from the vessel, caused her to drift; and if their presence could have prevented its drifting, the *vis major* which deprived the vessel of their presence is as much the proximate and efficient cause of the drifting as it would have been if that *vis major* had deprived the Wyvern of her anchors. Both men and anchors are necessary to prevent a vessel from drifting. If a vessel parts her cables in a storm and consequently drifts into collision with another vessel, it is a misfortune without fault, and each bears its own loss. *Steinbank* v. *Rae*, 17 How. 532. If the officers and crew of a vessel are washed overboard, or properly leave a vessel to save their lives, so that the anchors cannot be used, I think the same law applies to a subsequent collision.

It is true there are many cases in which the vessel is treated as the offending thing, and is charged or forfeited irrespective of the conduct or intentions of those who own her. *The Malek Adhel*, 2 How. 233, *The Porpoise*, 2 Curtis's C. C. R. 310. But this is for illegal or negligent uses of the vessel, by the officers and crew or some of them, and is resorted to from motives of public policy to suppress an offence or wrong, or to afford an indemnity to an injured party. I am not aware of any case where the vessel has been so treated, when neither its owners, or navigators, were chargeable with any fault.

The claim for damages must therefore be dismissed.

It is further suggested that there may be a claim for a general average contribution for the loss of the cable and anchor.

When the case of the *Mazurka* was decided, I understood the law, as settled by the Supreme Court, to be, that the admiralty had not jurisdiction of such a claim. But at the last term of the Supreme Court this subject has been carefully examined, *Dupont* v. *Vance*, 19 How. 162, and it is now settled, that the owner of cargo jettisoned has a maritime lien on the vessel to secure the payment of the contributory share due from the vessel, and that this lien may be enforced by a libel *in rem* in the admiralty.

But the question here is whether a voluntary sacrifice made by one vessel to avoid or escape an apprehended collision with another vessel, makes a case for contribution in general average.

It is certainly true that such a claim, when viewed theo-

retically, has an equity very similar to, if not identical with, that on which the famous Rhodian law was founded, and out of which the more modern doctrines of the law of general average have grown. "*Omnium contributione sarciatur quod pro omnibus datum est.*" Poth. Pan. 14, 2, 1. "*Equissimum enim est, commune detrimentum fieri eorum qui propter amissas res aliorum, consecuti sunt ut merces suas salvas habuer unt.*" Poth. Pan. 14, 2, 6.

At the same time it is quite clear that the Roman law never applied the principle between mere strangers. The Digest (9, 2, 29, 3,) says, "*Labeo scribit, si cum vi ventorum navis impulsa esset in funes anchorarum alterius, et nautæ funes praecidissent, si nullo alio modo, nisi praecisis funibus, explicare se potuit, nullam actionem dandam.*"

This is the precise case under consideration, except that the cable is cut by the mariners of the other vessel, which can scarcely weaken the claim. Emerigon cites this as good law and refers to the laws of Oleron and Wisbuy as containing a similar rule as to the removal of an anchor. 1 Em. on Ins. 416, ch. 12, §14.

And at the common law, there are cases of urgent necessity in which one whose property is destroyed, has no action —as pulling down a house to prevent the spread of a fire, as was resolved in 12 Co. 13, 63. See also Viner Ab. Necessity pl. 8, 4 T. R. 797, 1 Dall. 363, 17 Wend. 290, 2 Denio 461.

But whether an action would or would not lie, where the mariners of one vessel can escape only by cutting the cable of another vessel, and do so, the question here is whether the law of general average extends to a case where the cable of a vessel is cut by its crew to prevent an apprehended collision with another vessel.

I am not aware that the right of contribution has ever been extended beyond those who voluntarily embarked in a common adventure. Very eminent writers upon maritime law have considered that the right grows out of, and depends upon a contract implied by the law from the relation created by the contract of affreightment. Such is the opinion of Pothier, Traité des contrats de louages mar. Part. 2, Art. Prelim., of Pardessus, Droit Com. Part. 3, Tit. 4, Ch. 4, § 2. Chief Justice Parsons declares in *Kittredge* v. *Norris*, 6 Mass. 131, that the requisites to a case of general average, are, a contract, by which distinct proper-

ties of several persons becomes exposed to a common peril, and a relief from that peril at the expense of one or more of the concerned, who thereupon are entitled to a contribution from the rest. And in the case of *Dupont* v. *Vance*, 19 How. 162, as well as in *Lawrence* v. *Minturn*, 17 How. 109, 110, it will be found that the Supreme Court considered that the master, in case of necessary voluntary sacrifice to escape peril, was acting as the authorized agent of all concerned in the common adventure, and so bound all by his act, a principle which could hardly apply between mere strangers. I have on a former occasion declared that I did not consider the right to recover a general average contribution arises from a contract, *Sturgis and al.* v. *Cary and al*, 2 Curtis C. C. R. 384; but from a principle of natural justice, that they who have received a common benefit from a sacrifice voluntarily made by one engaged in a common adventure, should unite to make good the loss which that sacrifice occasioned. But I never entertained a doubt, that from the relation of the parties to a common adventure, the law would imply a contract for the purpose of a remedy; nor did I then suppose that it would be implied between strangers, who were not united in a common adventure by one or more contracts of affreightment.

The ancient as well as the modern codes of sea laws proceed upon the assumption that the master, representing all the aggregate interests by holding that office, has the rightful power to judge upon the sacrifice of one of the interests which he thus represents, for the benefit of the others. But they afford no ground for the position that he may judge and act for mere strangers, whose property has not been confided to his care.

In my opinion the only subjects bound to make contribution are those which are united together in a common adventure and placed under the charge of the master of the vessel, with the authority to act in emergencies as the agent of all concerned, and which are relieved from a common peril by a voluntary sacrifice made of one of those subjects. Consequently, I must reject the claim for general average.

The decree of the District Court must be reversed; but the questions are so novel, and attended with so much difficulty, and the equitable considerations in favor of some of the claims are such, that I do not think it fit to charge the appellees with costs.

C. G. Thomas, for the libellant.

W. G. Russell, for the claimant.

The Steamer Acorn and Cargo.

The Schooner Speedwell and Cargo.

Successful exertions by the crew of one vessel to avoid an impending collision with another cannot be considered salvage services rendered to the latter.

Curtis, J. — These are libels for salvage service alleged to have been rendered to vessels detained in the ice in the manner stated in the preceding case of the John Perkins. The libellants were two of the crew of the Steamer Acorn, and remained on board some hours after the rest of the steamer's company had gone on shore. They allege that while they were so remaining on board, the schooner Speedwell, whose officers and crew had also gone on shore, was forced by the action of the sea towards the steamer's stern; that they put out fenders, whose effect was to lessen the force of the shock when the two vessels came in collision, and also to cause the schooner to slide round the stern of the steamer and go clear, without doing any damage to either vessel. I do not deem it necessary to make an extended statement of the facts alleged and denied, or of the deductions proper to be made from the proofs. I am of opinion that the cases must be governed by the same principles already announced in the case of the John Perkins. I find no facts sufficient to distinguish these cases from that case. I consider that while the libellants remained on board the steamer they were not absolved from their contract, and were under an obligation to do all they allege was done for its safety; that they must be deemed to have acted for its preservation, and cannot claim as salvors of the other vessel, because they interposed to relieve both from the effects of a collision which occurred without fault. I desire to be understood as not intending to express any doubt of the gallantry and merit of the services rendered by these libellants. If not prevented by a rule of law, I should agree readily to the compensation awarded by the court below to be paid by the steamer. But in my judgment this is a matter which must be left to the discretion of the owners and underwriters, who, it is to be expected, will not be unmindful of any just claims which these men may have, upon their liberality.

These cases involve questions of great interest and im-

portance, and it would have been highly satisfactory to me if they had been open to an appeal; especially as I find myself unable to concur in opinion with the very learned judge* by whom these cases were decided in the court below. I have therefore considered them with great attention; and upon the points of law involved in them, they have been twice argued by counsel, from whom I have derived valuable assistance.

The decrees of the District Court must be reversed, and the libels dismissed, without costs.

C. G. Thomas, for the libellants.

J. A. Abbott, for the steamer Acorn.

W. G. Russell, for the schooner Speedwell.

U. S. District Court, Massachusetts District. September, 1857.

UNITED STATES *v.* BORDEN AND ELEVEN OTHERS.

A master is prevented in the free and lawful execution of his authority, within the meaning of the Act of 1835, ch. 40, defining the crime of revolt, if he be prevented from carrying into effect any one lawful command; and a command to continue the business of whaling is *prima facie* lawful.

A combination to refuse to pursue such business is not, of itself, the intimidation required as an element to constitute the crime, but it may be the means of intimidation.

Such combination and intimidation may be lawful. If, from the improper conduct of the captain, the crew have good reason to believe, and do believe, that they will be subjected to unlawful and cruel or oppressive treatment, or that a great wrong is about to be inflicted on one of their number, they have a right to take reasonable measures for his, or their own protection.

What would be reasonable measures must depend upon the nature and extent of the wrong and upon the means of prevention, having regard to the importance of preserving the authority of the master as well as to the importance of protecting the crew.

This was an indictment against twelve of the crew of the whaling ship Huntress.

The charge to the jury was delivered as follows, by

SPRAGUE, J. — This indictment charges the prisoners at the bar who were of the crew of the whaling ship Huntress, with having made a revolt.

The crime of making a revolt or mutiny is defined by

* Judge Ware.

the Statute of 1835, chap. 40, sec. 1, as follows, "That if any one or more of the crew of any American ship or vessel on the high seas, or on any other waters within the Admiralty and maritime jurisdiction of the United States, shall unlawfully, wilfully, and with force, or by fraud, threats, or other intimidations, usurp the command of such ship or vessel from the master or other lawful commanding officer thereof, or deprive him of his authority and command on board thereof, or resist or prevent him in the free and lawful exercise thereof, or transfer such authority and command to any other person not lawfully entitled thereto, every such person so offending, his aiders or abettors, shall be deemed guilty of a revolt or mutiny, and felony."

In this definition besides the requirement that the ship should be American, and the prisoners should be of her crew, there are four other elements in the offence—

1st. That a certain end must have been accomplished.

2d. That this must have been done by certain means.

3d. That it must have been done unlawfully, and

4th. Wilfully.

The end accomplished must be either the having usurped the command of the vessel from the lawful commanding officer, or the having deprived him of his authority and command on board thereof, or the having transferred such authority and command to any other person not lawfully entitled thereto.

The means by which the end was accomplished must be either force or fraud, or threats, or other intimidations.

In this indictment the charge is that the prisoners at the bar did prevent the master in the free and lawful exercise of his authority and command by intimidations. The master is prevented in the free and lawful exercise of his authority within the meaning of the Statute if he be prevented from carrying into effect any one lawful command. A command to continue the business of whaling is *prima facie* a lawful command, and if the prisoners at the bar by their united refusal to obey such command prevented the master from carrying on that business they prevented him in the free and lawful exercise of his authority unless there be some legal justification for such refusal. If this was done was it by the means alleged in the indictment, that is, intimidation, or in other words operating upon the fears of the master?

It appears by the evidence that there was a combination by the prisoners to refuse to pursue the business of whaling unless the master would comply with a certain request or demand. It is contended in behalf of the government that such combination is of itself the intimidation required by the statute; but that is not correct. The combination may never be made known to the captain, or if made known to him it may be in such manner and under such circumstances that it could not operate upon his fears. A combination therefore is not, of itself, intimidation, but may be the means of intimidating. And if by the array of numbers and union the fears of the master are excited, and through such fear he is prevented in the free and lawful exercise of his authority, there is intimidation within the meaning of the statute. If the jury find that the master was prevented in the free and lawful exercise of his authority by intimidations, the next inquiry is whether it was done by the prisoners wilfully, that is, whether they accomplished that end by that means, knowingly and intentionally. If this also should be found against the prisoners, the next inquiry would be, whether, in doing this the prisoners acted unlawfully; for there are cases in which it may be lawful for the crew to prevent the master in the free exercise of his authority, or even to deprive him of it altogether. This is implied by the statute itself. It is not the wilfully depriving the master of his authority, even by threats or intimidations, that is made a crime, but the doing so unlawfully; and if this indictment had alleged all those acts, without alleging that they were done unlawfully, it would have described no offence. It is insisted in behalf of the prisoners in the present case, that they had a right to refuse further to continue the business of whaling, and to prevent by intimidation the master from exercising his authority to compel them to carry on that business; it becomes therefore a most material inquiry whether their conduct was lawful. I shall not undertake to state all the cases in which such conduct may be lawful, but confine myself to instructing you upon the questions raised by the evidence in the present case.

If from the improper conduct of the captain, the men had good reason to believe, and did believe, that they should be subjected to unlawful and cruel or oppressive treatment, they had a right to take reasonable measures to protect themselves from such treatment.

If from the improper conduct of the captain the men had good reason to believe and did believe that a great wrong was about to be inflicted upon one of the crew, they had a right to take reasonable measures to protect him therefrom.

What would be reasonable measures, must depend upon the nature and extent of the wrong, and upon the means of prevention, having regard to the importance of preserving the authority of the master, as well as to the importance of protecting the crew.

C. L. Woodbury, district attorney, for United States.

J. H. Prince, for defendants.

Supreme Judicial Court of Massachusetts. Suffolk County. March Term, 1858.

POTTER *v.* IRISH.

Under the act of 1850, c. 27, the sale or mortgage of a ship must be recorded at the Custom House, where she is at the time registered.

This was an action against the defendant, a deputy sheriff, for attaching one quarter part of the bark O. J. Chaffee, as the property of N. G. Bourne, in a suit against said Bourne by O. J. Chaffee, Esq., of Charleston, S. C. The main question in the case was whether, at the time of the attachment, Bourne had any attachable interest.

It appears that the bark was built in Camden, Maine, and has always borne the name of that town on her stern, and she was originally enrolled in Belfast, in 1849. Subsequently, in 1850, at New Orleans, she took a register, which was afterwards, in 1851, changed for one in Boston, and the latter has not been changed since. This register, like the one in New Orleans, describes the vessel as of Camden.

The plaintiff claimed to hold all Bourne's interest in the ship, by virtue of a mortgage which was duly executed, and recorded in Belfast, the port at which the vessel belonged.

The attaching creditor contended that this mortgage was invalid as to him, because it was not recorded as the right place, in accordance with the act of 1850, c. 27; that it

ought to have been recorded in Boston, where the ship had a register at the time.

Held, that the mortgage was not recorded in the right place, and the defendant was justified in attaching Bourne's interest, at the suit of Chaffee. There were several points raised and discussed at the bar, but as this one was decisive of the whole case, the court did not find it necessary to decide them. The act of Congress of 1850, c. 27, provides expressly, that no bill of sale, mortgage, hypothecation, or conveyance of any vessel or part of any vessel shall be valid against any person other than the grantor, his heirs and devisees and persons having actual notice thereof, unless such bill of sale, mortgage, hypothecation or conveyance be recorded in the office of the Collector of the Customs where such vessel is registered or enrolled. The act was passed for the obvious purpose of relieving the mercantile world from the difficulties of ascertaining the title to ships; and the construction contended for would not only prove highly inconvenient, but was against the clear intent of the law itself. As the mortgage was not recorded in Boston, where she was at the time registered, and as there was no proof that the attaching creditor had any actual notice of the mortgage, the defendant was fully justified and must have judgment.

R. H. Dana, Jr., for the plaintiff.

P. W. Chandler and *Geo. O. Shattuck*, for the defendant.

Rogers *v.* Sawin.

The mere open and unobstructed use of a window for light and air, for more than twenty years does not constitute such an adverse enjoyment, as will enable the owner to recover damages against the adjoining proprietor for building a wall against the same on his own land.

It seems that the fact that the sill of such window projected over the adjoining estate, is evidence tending to show such use to have been claimed as adverse. Such fact will be entitled to greater or less weight, according to the position of the sill and the defendant's opportunity for knowing its existence.

This was an action of tort, brought in the Superior Court for Suffolk County. The plaintiff alleged that he was possessed of certain ancient windows, in a house at the corner of Temple and Derne Sts., in Boston, and that of right, the light and air should come to said windows free

and unobstructed, but that defendant has entirely darkened said windows by building a wall.

The plaintiff offered evidence tending to show that he held the estate by lease of the owner, that the window in question had existed uninterruptedly from the year 1829 until the autumn of 1855, free and unobstructed, and that the defendant re-built his house and built his wall directly against the window in question,— also, that the sill of the window projected over the defendant's line, so much, that it was cut off by the builders when the defendant built the wall complained of. The window was in the fourth story of the house. The title of the two estates was shown not to have been in the same person since 1826.

The court below instructed the jury that the mere open and unobstructed use of the window for light and air, for more than twenty years prior to 1852, without interruption, either with or without the fact of the existence of the sill and the state of the title, did not necessarily constitute an adverse enjoyment so as to enable the plaintiff to recover; that the word adverse meant that the plaintiff's use must be under a claim of right with the knowledge of the owner and not with his permission; that the plaintiff must have exercised some right conflicting with that of the defendant, other and farther than the mere ordinary use of the window for the admission of light and air; that the use must work some wrong or deprive the defendant of some beneficial right; that the existence of the sill was a fact tending to show that the plaintiff claimed the use of the window adversely to the defendant, proper for the consideration of the jury; that they might well take into view the position of the sill and the opportunity the defendant had of knowing of its existence, and by way of illustration, stated that more weight might perhaps be due to the fact that such a sill existed if it was near the ground in a frequented passageway, and in full view than if it was high up in the fourth story of plaintiff's house, and over defendant's roof. Verdict for the defendant, and plaintiff alleged exceptions to the aforesaid instructions. *Exceptions overruled and judgment of the Superior Court affirmed.*

J. G. King, for plaintiff.

Sohier and Welch, for defendant.

(NISI PRIUS.)

Essex County. April Term, 1858.

BROWN *v.* PERKINS *et ux.*

By St. 1855, c. 215, § 37, all intoxicating liquors kept for sale, are declared common nuisances. By St. 1855, c. 405, § 1, all buildings, places or tenements used for the illegal sale or keeping of intoxicating liquors, are declared common nuisances, and are to be regarded and treated as such.

Held, That all persons may, without process of law, destroy such liquors, in the exercise of their right to abate a public nuisance.

That any person or number of persons, in combination, may use what force is necessary to enter a building, which is not a dwelling house, for this purpose.

It seems that any unnecessary violence, or the destruction of any other article than liquors, or the fact that no liquors were found, would render the person who enters the building a trespasser *ab initio*.

It seems that it is the use which constitutes the nuisance, and that the destruction of the building would not be justifiable.

This was an action of tort, originally commenced in the Court of Common Pleas, and removed to this court upon the affidavits of the defendants.

The declaration charged that the defendants forcibly entered the plaintiff's close, situated in Rockport, and injured the same and destroyed some lemons and vinegar, and other articles of trade and consumption, the property of the plaintiff.

The defendants answered, in substance, that they did not commit the alleged trespass, but that on the occasion referred to, certain parties, other than themselves, assembled together to abate certain common nuisances; that the shop of the plaintiff was kept for the illegal sale of spirituous and intoxicating liquors, and that certain parties, who had suffered special damage thereby, entered, as they lawfully might, and abated the nuisance, using no more force than was necessary. They admitted that they were in the vicinity of those who abated the nuisance, but were guilty of no act, which, even if the justification failed, could be regarded as a participation in the act of tort.

After the close of the arguments, the charge to the jury was delivered by

SHAW, C. J.—As this is a case of a good deal of importance, and involves the consideration of questions of law not

before discussed, I shall confine myself to a statement of the principles of law, which, in my judgment, should control it. It is an action of tort, formerly known as trespass *quare clausum*. Brown complains that Perkins and his wife entered his premises by violence and without his consent, and asks damages for the injury done thereto, and for articles taken therefrom and destroyed. In a trespass jointly committed by many, all are principals, and severally liable, and the plaintiff may elect out of the whole number engaged in the common enterprise, one or more against whom to bring his action. He can, however, sustain but one such action, and there can be no contribution against the wrong doers. Damages are claimed for injury both to real and personal property. The plaintiff's enclosure, called in law his "close," is said to have been invaded unlawfully and damaged, and certain articles of property destroyed therein, without right or color of law. Now two questions arise:—

1. Has the plaintiff proved his case?
2. Have the defendants, if proved to have committed the acts charged, established their justification?

In the determination of these questions, novel points are presented for consideration, but the court must pass upon them at once, expressing no doubts to the jury, if it should entertain any — but of course, reserving the right of reconsidering the instructions now given to this jury, in case the questions should hereafter come before the whole court for further advisement.

The two defendants, Perkins and his wife, are charged with having broken and entered the plaintiff's close unlawfully. According to the provisions of law, which, in this respect, I do not understand to have been altered by any of the recent statutes, which so materially change the relation of husband and wife, a man is responsible for the wrongs done by his wife, and should be joined in an action for an injury in which she alone was concerned. If she took no part in it, you must render a verdict in her favor. But if he and she jointly, or she alone, was concerned, the verdict must be against both.

The defendants are charged with being two who broke and entered the door. Upon this point, the evidence is contradictory, and the determination of this question of fact is for you. The law is, that where many engage in a common enterprise to do an unlawful act or a lawful act in

an unlawful manner, all are responsible for the acts done, and the consequences legitimately flowing therefrom, and the combining and conspiring may be proved, as well by general conduct as by specific acts of participation. If two men pursue a third for the purpose of robbery, and one of the two follows his victim on to a bridge, while the other remains at the end of the bridge, to prevent assistance being rendered or to give a timely alarm, the first, meantime, committing the robbery, they are both liable. So in the case of the White murder, perpetrated within sight of these windows. A man who was proven to have been on the watch at a distance from the scene of action, but ready to render assistance, and inspired by a common purpose with the assassin, was condemned as a principal. These defendants do not deny they were near the scene of action, with hundreds of others, — as some witnesses have said, the whole population of Rockport — and that they rejoiced in what was done.

Three or more persons assembled for an unlawful purpose, make a riot. Persons standing in relations of authority to those who act, as father to a child, husband to a wife, are liable, if they encourage by their presence, and do not interfere.

If you are of opinion that a party was organized in obedience to a previously concerted purpose, which went to the common in Rockport for the purpose of forming a procession, and afterwards proceeded to the destruction of property in a riotous and unlawful manner, you have evidence of a riotous organization, and every one who participates in it, or encourages it, in any degree, at any stage of the proceedings, is responsible for the consequences. All are principals, and liable for all the natural and legitimate consequences of the common enterprise. Thus, if Mr. and Mrs. Perkins knew of the purpose of the company, and were present for the purpose of encouragement or actual participation, or if Mrs. Perkins alone was so concerned, both are liable, unless the justification is established. And this is the great question. That which an individual may lawfully do, a number of individuals may lawfully do. The ground here set up is that all intoxicating liquors illegally kept for sale, together with the vessels and implements of the trade, and the building in which they are found, are common nuisances, which individuals may abate.

Two acts of the year 1855, viz: c. 215, § 37, and c. 405, § 1, have been cited and relied on. By the first of these, all intoxicating liquors kept for sale, and the implements and vessels actually used are declared common nuisances. By the latter, "all buildings, places or tenements used as houses of ill-fame, resorted to for prostitution, lewdness or for illegal gaming, or used for the illegal sale or keeping of intoxicating liquors, are hereby declared common nuisances, and are to be regarded and treated as such." If the only way in which the latter could be abated, would be by tearing or burning down the house, such an act might be justified; but it is the use to which the building is put which constitutes the nuisance. The building itself is well enough, and in a city it might be part of a block, and could not, perhaps, be abated without injuring the property of innocent persons. Therefore, I do not suppose a man would be justified in burning or tearing down a building used for the illegal purposes there named, to wit: gaming, prostitution, liquor selling.

Three questions arise here:—

1. Can all persons, without process of law, destroy such liquors?

2. Have they the right to use force to enter a place, (not being a dwelling house), for this purpose?

3. Can a large number of persons combine to use force?

1. All persons have a right to abate a public nuisance. As in cases cited by the defendants, individuals may cut down a gate erected in a highway, or destroy a bridge thrown over navigable waters. I am of opinion that if liquors are kept illegally for sale, with the implements of trade, having been declared by law a public nuisance, every person may destroy them.

2. If kept in a shop, not a dwelling house, it is justifiable to use so much force as is necessary to come at such liquor and vessels, for the purpose of destroying them. A dwelling house is surrounded by law with a peculiar sacredness, and in that case the rule would be otherwise. The law abounds in maxims declaring that a man's house is his castle.

3. If the act is justifiable when done by one person, then it is justifiable when done by the combined action of many. If the act is right, and one may do it, then three may do it, and if three may do it, I do not see why a hundred may not do it.

But this is a high right; not a personal right, but an authority conferred by law, and must be exercised under a high responsibility. If a party claiming to justify under it, in any way exceeds his authority, he becomes a trespasser *ab initio*, and is responsible, not only for what is confessedly unjustifiable, but also for all other acts, which, but for such excess, might have been justified. And it is not for people to take law into their own hands. We have melancholy accounts from other parts of the Union, and from other countries of organized resistance to law. Sometimes, and often, these outbreaks proceed from a purpose in itself laudable, but which does not justify an usurpation of power. The assaults of vigilance committees, and the administration of what is now too well known as "Lynch Law," are not what can be contemplated with satisfaction by any lovers of good government; and that must be a most lamentable state of society, where such a necessity exists. I do not see that the presence and approval of husbands and fathers, magistrates, policemen, ministers of the Gospel and deacons, renders such action any the more justifiable; but if unjustifiable, would make it all the more formidable.

It is the right of individuals to abate a public nuisance; this right must be most cautiously exercised. If no liquor is found in the shop so entered, or if unnecessary violence is used, or any other articles are taken or destroyed, the justification fails. It must have been kept there for illegal sale. If for sale at all, it was illegal, as the plaintiff has been proved not to have been the authorized town agent. Was it for sale at all? Of this the defendants must satisfy you. If it were for sale, then I hold that they had a right, using as little force as might be, and injuring nothing else, to enter the shop in question, and destroy the liquor kept there, with the vessels in which it was kept, and the implements of such illegal traffic.

One or two suggestions may be made in regard to the question whether there has been any excess of authority. In the first place, was it necessary to break in. You are to consider whether the owner was first applied to, and whether he refused permission to enter, or whether he was near enough to have his permission asked. You are also to consider whether any articles, other than liquors, illegally kept for sale, were destroyed. The parties abating

the nuisance had no right to destroy any vinegar; and if they did so, they exceeded their authority, and the justification fails.

The jury found a verdict for the defendants. It is understood that the case will be carried to the full court.

Otis P. Lord, for the plaintiffs.

S. H. Phillips and *R. S. Rantoul*, for the defendants.

Suffolk County.

In re O'HARA.

Personal recognizance of a minor not requisite or binding, except to appear as a witness under R. S., c. 135, § 20.

This was a writ of habeas corpus, directed to the keeper of the jail at Lowell, by virtue of which the body of one James O'Hara, a minor, was brought before the court.

An indictment had been found against the minor for larceny, upon which he had been arrested, and for non-compliance with the order of court, "that the said James O'Hara do recognize, &c.," he was committed for trial. The father of the prisoner made an application in behalf of his son to procure bail. The application was made to two justices, according to the statute; sureties were accepted, and the recognizance and order of discharge sent to the jailer, who neglected to obey the same, and this writ was issued.

In behalf of the officer it was argued that the recognizance ordered by the court and contemplated by the statute is the personal recognizance of the prisoner with sureties, and not a mere recognizance of sureties for the prisoner — that liberty may be regarded as a necessary for the recovery of which the minor may bind himself, according to the requirements of the court and the statute, and the case of *McCall* v. *Parker*, 13 Met., 372, was cited.

MERRICK J. — The decision in that case was that an infant may be liable on a bastardy bond, given under R. S., c. 49, § 1, which directly requires such bond to be given by the delinquent, making no exception with regard to minors. But in the case of bail, § 20, c. 135 R. S., expressly provides that in some cases the recognizances of *femes covert* and minors to appear as witnesses may be good, "notwithstanding the disabilities of coverture or

minority." It would seem to imply that in other cases these disabilities were considered effectual. And § 22 does not provide that the prisoner "shall recognize," but that he "shall be admitted to bail." The proceedings were not very regular, but are sufficient to authorize the court to grant the discharge.

George Sennott, for prisoner.

A. C. Clark, for respondent.

Norfolk County. October, 1857.

HARMON *v.* HILLIARD.

Insolvency — Partnership — Jurisdiction of Supreme Court.

This was a petition under statute 1838, § 618, to revise proceedings before a commissioner of insolvency. The petition set forth that Horace King and Jacob B. Flagg had been partners; that the partnership was dissolved; that each partner had filed a petition representing himself to be insolvent, both individually, and as a member of the late firm, and severally praying for the benefit of the insolvent laws, and that Adams and Clark, two of the respondents, were chosen assignees in each case. That the said respondents claiming to be assignees of the firm of J. B. Flagg & Co., were allowed to prove a claim of $22,000 against the separate estate of King, and to receive a dividend thereon; that said claim was improperly allowed, and concluding with prayer that the same be expunged, and that the dividend so paid might be distributed among the separate creditors of King.

The answer substantially admitted these allegations, and alleged the following facts: —

Two years before these proceedings, King & Flagg borrowed $20,000, giving their joint and several notes, secured by mortgage on the partnership property. Of this sum $8,000 went to the use of the firm, and $12,000 to the private use of King. Afterwards $10,000 was borrowed by King & Flagg, all of which went to the use of King. This sum was also secured by mortgage of partnership property, and also by mortgage on King's private estate, and all these mortgages were paid by the assignees out of the partnership estate. The answer concluded by asking the

direction of the court as to how they should state their accounts. It was held by

SHAW, C. J. — 1. That the claim of $22,000 must be expunged from the list of debts proved; the orders of distribution vacated, and the case remitted to the Commissioner for further proceedings. 2. That the respondent's prayer for directions and other matters not responsive to the petition, could not be considered, the jurisdiction of the court in this matter being in its nature appellate. Parties aggrieved by proceedings before the Commissioner might come to the Supreme Court with their complaints, but original questions for advice or direction could not be moved there.

J. W. May, for petitioners.

George T. Curtis, for respondents.

Suffolk ss. March Term, 1858.

STONE *v.* STONE.

STONE *v.* STONE.

Divorce — Practice — Right to open and close in case of cross libels for divorce.

These were two libels for divorce. The one brought by the wife was prior in point of time, and the divorce was claimed for desertion. The husband in his answer recriminated. He also brought a libel in which he claimed a divorce on account of adultery and desertion. When the first case was called up, the court ordered the two to be heard together. A question arose as to the right to open and close.

BIGELOW, J., ruled that the counsel for the libellant in each case should open and close in that case. Thus, that the libellant in the first case should open, and put in the evidence to make out the issue in her libel: that the counsel for the libellant in the second case should then put in his whole evidence; that the libellant in the first case might then rebut on the issue of adultery. The closing arguments were made in this order:—The libellant in the second case closed on the question of desertion. The counsel for the libellant in the first case then closed his

whole case, and the counsel for the libellant in the second case then closed on the issue of adultery.

J. A. Andrew, for the libellant in the first case.

P. W. Chandler and *G. O. Shattuck*, for the libellant in the second case.

Superior Court for the County of Suffolk.

March Term, 1858.

CUTTING, ADM'X, *v.* TOWER.

An action of tort, for selling bad or poisoned meal to an intestate, in his lifetime, as food for his horses, by reason of which the horses died, is an action which survives under the provisions of R. S. c. 93, § 7.

The fact that the damage was done by an alleged fraud, or that the injury was consequential, rather than direct, cannot affect the question of survivorship.

It seems that under the Act of 1857, ch. 305, an executor or administrator, when a party to a suit, is to be admitted to testify without the restrictions imposed by the Act of 1839, c. 107.

HUNTINGTON, J.—This was an action of tort by the plaintiff, as administratrix of one Cutting, deceased, against the defendants. The second count alleged that the defendants, in the lifetime of Cutting, sold him corn meal as fit for food for horses; that it was not fit for food for horses, but damaged and poisoned; that the defendants knew it; and that four of the intestate's horses died in consequence of eating the meal. The defendant demurs, on the ground that the cause of action does not survive.

The argument is, that the gravamen of the action is fraud and deceit, and that the Revised Statutes, c. 93, § 7, do not apply to such a case. The language is, that actions "of replevin, trover, trespass for assault, battery or imprisonment, or for goods taken and carried away, and actions of trespass and trespass on the case for damage done to real or personal property," shall survive.

This action being for damage done to the intestate's horses, in his lifetime, so far brings the case within the express terms of the statute. The distinction is between damages affecting real or personal property, and those purely personal, such as slander, malicious arrest, and breach of promise of marriage. The statute of 1842, c. 89,

provides only for a limited class of cases of damages to the person, and does not affect this question.

Neither does the form of remedy, as contract or tort, or the allegation that the injury was immediate or consequential, touch the inquiry. In *Reed* v. *Hatch*, 19 Pick. 47, it is held that a mere fraud or cheat, by which one sustains a pecuniary loss, cannot be regarded as a damage done to personal estate. The allegation of damage there was that by representations of credit the plaintiff had been induced to part with his goods and sustained pecuniary loss. The court held that the statute must be confined to damage done to some specific personal estate. The case at bar, therefore, seems to come within the distinction and to meet the requirements of this limited construction. In *Stebbins* v. *Palmer*, 1 Pick. 79, the distinction is said to be between "causes of action which affect the estate, and those which affect the person only."

Stanley, adm'r, v. *Gaylord*, was trespass for damage in taking a cow of the plaintiff's intestate, in her lifetime.

The court, in their opinion as to other points raised, stated that they did not mean to rule that an action of trespass could be maintained by the administrator on the facts in that case. This seems to imply a doubt as to the surviving of the cause of action in the case at bar. But the same case came before the court again, 1 Cush. 542, and the court withdrew the previous intimation, and held that the evidence showed that the taking was in the lifetime of the intestate, and if she could have maintained an action of trespass, the administrator might also; citing authorities and the R. S. c. 93, § 7, 8.

Smith v. *Sherman*, 4 Cush. 408, reaffirms the doctrine.

The damage is alleged to be done to the property of the intestate in his lifetime, and the fact that it was done by an alleged fraud of the defendants, rather than by taking and driving away the horses, or that the injury was consequential rather than direct, does not affect the question of survivorship. *Demurrer overruled.*

Note.—On the trial of the case, a further question arose, under the provisions of the late act of 1857, as to parties being admitted to testify. Under the Act of 1856 upon this subject, Judge Bigelow in the Supreme Court, and Judge Abbot in the Superior Court, at *Nisi Prius*, ruled that where the plaintiff sued as administrator he could not be admitted to testify except under the provisions of the Act of 1839, c. 107.

The Act of 1857 is more broad and comprehensive in its enactments than that of the previous year. It embraces not only parties in all civil actions and proceedings, including probate and insolvency proceeding, suits in equity and divorce suits, and cases where the wife is a party, under restrictions, but it provides that where an executor or administrator is a party to the proceeding, the other party shall not be permitted to testify in his own favor, except as to acts done or made after probate of the will, or appointment of the administrator. The court, for the purposes of the trial, ruled that this language contained an implication that the administrator was to be admitted to testify without restriction, and contemplated the calling of both parties where one was executor or administrator, and that if such person could testify in all probate proceedings, it was not to be supposed that the Legislature, without express exception, intended to make a difference in practice where there was no distinction in principle.

New York Superior Court. General Term, Feb. 1858.

[Before Bosworth, Hoffman, Slosson, Woodruff and Pierrepont, J. J.]

CROSS RESPONDENT *v.* SACKETT AND AL, APPELLANTS.

Where the projectors of a bubble corporation issue certificates of stock containing false and fraudulent statements of the capital of the company and of the interest represented by such certificates, and accompany each certificate with a written power authorizing a transfer at large by the party to whom the same is issued, they will be held to have created a sufficient privity of contract to render them liable to any subsequent purchaser deceived by such fraudulent representations.

Upon demurrer to a complaint; appeal from an order at special term, before DUER, J., of judgment for the plaintiff upon a demurrer, unless the defendant answer the complaint in the time prescribed, and pay the costs.

The complaint alleged in substance that the defendants, the projectors and directors of the Gold Hill Mining Company, had been guilty of certain enumerated false and fraudulent practices and statements by which it had become to be generally believed in the city of New York, and was believed by the plaintiff that the said Gold Hill Mining Company was in fact possessed of property of at least one million of dollars in value, and that shares and interests therein were of the value of at least five dollars a share, and that such company had earned at least the sum of $50,000 over expenses; that the certificates issued by the defendants with the

power of attorney were in circulation and in course of sale, pledge and disposition, and were believed by the plaintiff to be true and genuine evidences or representations of actual interest in a capital of one million of dollars, and so believing, and on the faith and credit of the aforesaid false and fraudulent acts and representations of the defendants, of the falsity and fraud whereof the plaintiff was ignorant, he did, on the 14th day of April, 1854, purchase of one Richard Schell, then being the holder of one of the original or substituted certificates, an interest in the said capital stock to the extent of one thousand shares, and paid therefor the sum of $3,500.

That he received a certificate and power from Schell, which he surrendered to the Company, and received in lieu thereof from the defendants another certificate representing the capital as aforesaid, and that the defendants transferred one thousand shares to him; that the statements and representations were false, and that the interest supposed to have been acquired by him was in fact worthless. That by means of such false, fraudulent and deceptive practices of the defendants, the said plaintiff has sustained damage to the amount of $6,000, for which he demands judgment.

The opinion of the court, which we are obliged somewhat to condense, was delivered by

HOFFMAN, J. — Such being the substance of the case made by the plaintiffs, my first subject of inquiry shall be, What did the certificates, issued by the defendants in their corporate name, purport to represent? What, under the statute of organization, ought they, by law, to have represented? And what was the truth in relation to such representations?

The representation on the certificate with its attendant power was, that the party named in it was entitled to an interest proportionate to the whole stock, in a money capital or in property equivalent substantially to a money capital of one million of dollars. This is the statement made and uttered by the defendant with an implied engagement for its truth upon these instruments.

And this is precisely what under their charter they were allowed and directed to represent, and they could only comply with the acts of the Legislature when such was the representation, and when it was true.

But what did these certificates in truth represent? what,

for example, was the fact as the complaint states it, as to the certificate for 1000 shares purchased by the plaintiff? instead of an interest in five thousand dollars of money once contributed and presumed to exist in some form of value; or in mines and property of an equal or substantially equal value, he got what he alleges to be wholly worthless, and which, upon any calculation upon the statements made, must be of greatly inferior value.

We are bound to assume the allegations of this complaint to be true, in all their reasonable and legal import; and if so, a case is presented of the formation of a bubble company, contrived for purposes of private emolument, its authors and managers fraudulently publishing statements tending to produce the belief that the stock was at least of its par value; that its business had warranted successive dividends from profits; that these false and deceptive representations were made by the defendants, the authors or managers of the scheme; that they were made in such an apparent form of negotiability as from the custom of business was peculiarly calculated to delude and to injure; and that a delusion and injury has actually been produced and fallen upon the plaintiff in consequence of such acts.

The learned counsel of the defendants has pressed upon us the proposition, that such a suit as this has been unknown through all periods of the law, except when it was warranted by the statute of George the First, (cap. 18, § 20, 1719), consequent upon the South Sea Bubble. He insists "that because the common law afforded no remedy to the remote purchaser, this statute was passed, giving in the 20th section an action for damages."

He has called our attention to the history of those gigantic frauds, which have acquired an immortality of pre-eminence among the destructive projects of the visionary or the designing, of the Mississippi and South Sea schemes. A member of Parliament, when the act was discussed, admitted, "that the directors could not be reached by any known law; but he said extraordinary crimes called for extraordinary remedies. The Roman lawgiver had not foreseen the possibility of a parricide, but as soon as the first monster appeared they found a law. The sack and the Tiber were his doom." (Lord Mahon's History, vol. 1, p. 280.)

But I cannot believe that either the argument of the

learned counsel, or the declamation of the rhetorician of the House of Commons, is sufficient to stamp the law of England with the impotency attributed to it. I consider that there have always been principles of law, and tribunals adapted and competent to redress wrongs of this nature.

The act of George the First was annulled in the sixth year of George the Fourth (1825.) The 19th, 20th, and 21st sections were recited and repealed with this declaration: "And whereas, it is expedient that so much of the above act as is above set forth, should be repealed, and that the said undertakings, attempts, practices, and acts, should be adjudged and dealt with according to the common law, notwithstanding such act. Therefore, &c."

We may assume that the Parliament thought there was some mode of dealing with such fraudulent practices as the 20th section of the act had aimed at, according to the doctrines of the common law, and through some of the methods of redress it had supplied.

In the *Charitable Corporation* v. *Sutton* (2 Atk. 401, 1742), Lord Hardwicke announced as an unquestionable principle, that a Court of Chancery could give relief against all who are constituted expressly, or by operation of law, trustees or agents to parties injured by their acts. It is true the corporation itself there sued the managers for a defalcation.

In the case of *Hayes* v. *Morgan* (April, 1857), I had occasion to consider the following cases: *Hitchins* v. *Congreve*, 4 Russell Rep. 562; *Walburn* v. *Ingilby*, 1 Milne & Keene, Rep. 61; *Foss* v. *Harbottle*, 2 Hare Rep. 401; *Dodge* v. *Woolsey*, 18 Howard U. S. R. 33; *Benson* v. *Heathcum*, 1 Y. & Coll. Ch. Cases, 326; and *Robinson* v. *Smith*, 3 Paige R. 230.

The law which may be gathered from these cases is, that there is no wrong or fraud which directors of a joint stock company, incorporated or otherwise, can commit, which cannot be redressed by appropriate and adequate remedies. The first mode is, when the company in its corporate name, seeks to set aside the fraud, to reclaim abstracted property, or prevent a corporate loss. Such is the case of the *Corporation* v. *Sutton*, and the rule in *Foss* v. *Harbottle* The next mode is when shareholders bring an action for the same object unitedly, or in the form which the Court of Chancery permits, of a bill by one or more, on behalf of

themselves and all others having a common interest. This right exists under various circumstances. It clearly exists when the directors or agents, whose deeds or omissions are impeached, do themselves control the company, and impede the assertion of a right in its own name. See also *Mozley* v. *Allston*, Phillips Ch. R. 790.

But another question, and closer to the present, arises, when an individual claims redress in his own name, and solely on his own account, for a fraud practised by a trustee or director of an association from which he has suffered loss, when, although his claim is founded precisely upon the same facts and relations as many others, yet as his injury and loss is disconnected and peculiar, he seeks to assert his right alone.

The old case of *Colt* v. *Wollaston*, 2 P. Wms. 154, is an example of this character. The plaintiff sought by his bill to be repaid two sums of money advanced to the defendants as managers and projectors of a bubble called the land security and oil patent, for the purpose of extracting oil out of radishes. There were two plaintiffs, and they purchased six shares each. The company was to have a capital of £100,000. The shares to be 5000, at £20 each. Wollaston bought an estate for £31,800, which was under mortgage for £28,000, and he was to be paid £57,200 out of the fund. It was represented by the defendants to be a most advantageous project. The Master of the Rolls said "this is an imposition, to propose the surplus of the value of an estate (which cost but £31,800), after £85-000 charged upon it, more than double its value, as a security to the contributors who laid out their money upon this project; it is giving them moonshine instead of anything real."

"It is no objection that the parties have their remedy at law, and may bring an action for money had and received; for in case of fraud a Court of Equity has a concurrent jurisdiction with a Court of Law." The decree was for payment of the money paid, interest, and costs.

In *Green* v. *Barrett*, 1 Simon's Rep. 45, the plaintiff was a shareholder, and the defendants were directors of a company called the Imperial Distillery Company. Bell was to recover a deposit of £100, which he had paid upon twenty shares allotted to him. His communications were with the secretary and bankers of the company. But a circular or

prospectus had been issued by the directors, on which he much relied. The nature of the bill is thus stated by the Vice Chancellor: "The prospectus of this undertaking was published, not with any intention to establish a company on the principles there stated, but as a snare to persons who might unwarily become subscribers, and for the purpose of enabling the directors to make a profit by the sale of shares which they thought fit to assume to themselves. It appears to me the case is governed by that of *Colt* v. *Wollaston*, and upon that authority I overrule the demurrer."

In *Blair* v. *Adair* (1 Simons Rep. 37. 2 Simons, Rep. 289,) the bill was by five persons on behalf of themselves and numerous other parties, to an indenture by which a large number of shares had been assigned to the five. It was in trust with a power of attorney to sue; obviously to avoid the difficulty of making all parties. The allegations were of a deceptive prospectus, caused to be printed and published by the directors, and other acts of fraud in misapplying the deposit money, &c. The bill also showed that some of the original shareholders had transferred their shares to others, and some of the former with the latter united in the assignment to the plaintiffs.

The Vice Chancellor overruled a demurrer for want of equity but sustained one *ore tenus* for want of parties holding that the assignors must be on the record.

The bill was then amended and the assignment was left out, and naming three other shareholders as parties, stating that they held some of the shares by the original purchase, and some by transfers, made to them by other shareholders.

A general demurrer was taken for want of equity, and one taken *ore tenus* for want of parties.

The Vice Chancellor (Shadwell) held that this was a case of fraud which a Court of Equity could relieve, as well as a Court of Law, and cited and approved of *Colt* v. *Wollaston*. He held that the plaintiffs, in their capacity as original shareholders, could sustain the bill, but not as purchasers from prior purchasers. An objection for want of parties was overruled, the bill stating that the plaintiffs did not know the names of the other shareholders.

When we consider the arguments of counsel, (Mr. Sugden,) it will appear that the objection was on the ground that the case could not proceed without the assignors of

the scrip assigned being brought in, and upon nothing else.

Lord Brougham is stated by Mr. Collyer, (on Partnership, § 1101,) to have disapproved, in the case of *Thompson* v. *Paules*, of the series of cases I have cited. I have searched ineffectually for this decision. It may well have been placed upon the ground that this simple case, even of a fraud thus presented, was not proper for a Court of Chancery, when the remedy was perfect at law.

It must have been upon this ground, or some ground which does not extend to a denial of any redress in any court. This is clear, from his other decisions. *Walburn* v. *Ingilby* was before him, and would have been sustained by him, as I consider, but for the technical objections before noticed.

And in the *National Exchange Company* v. *Drew*, (House of Lords,32, Eng., L. & Eq. Rep. 4,) he stated in the clearest terms that a deception by a company, through its directors, by representing shares to be worth £100, which were known not to be worth over £50, gave the right of action on the ground of a false representation againt all who made it.

The case at common law of *Gerhard* v. *Bates*, 20 Eng. C. L. Rep. 130, has been much criticised by counsel.

The second count in that case was sustained by the court, and when analyzed it presents this case. That the defendants and others unknown had formed a company for the purpose of smelting and refining the ores of certain mines in Spain, and divide it into 96,000 shares, of £1 each, out of which 12,000 shares were to be appropriated to the public at 12s. 6d. each, free from further calls; that such 12,000 shares were actually offered to the public; that the defendant was prompter and managing director, and being such on the day, &c., intending to defraud, deceive and injure the public, and to cause it to be publicly advertised and represented that the company was likely to be a safe and profitable undertaking, and also to deceive the public who might become purchasers of the said 12,000 shares, and to induce them to become such purchasers, falsely, fraudulently and deceitfully procured, and caused it to be publicly made known and advertised in and by a certain prospectus issued by the defendant as such director, that the promoters did not hesitate to guarantee to the bearers of the 12,000 shares a minimum dividend of 33 per cent., payable half yearly, to remain in force until the 12s. 6d. per share should

be paid. That the defendant, by means of such false and fraudulent pretences and representation, after the making of the same, wrongfully and fraudulently induced the plaintiff to become the purchaser and bearer of 2,500 of the said 12,000 shares, and that he paid 12s. 6d. for each share; that in truth the statement, &c., was false.

Lord Campbell said, that had the declaration been that the defendants delivered the property to the plaintiff containing the false representation, there could be no question in the case. If the plaintiff had only averred further, that having seen the prospectus he was induced to purchase the shares, objection might be made that a connection did not sufficiently appear between the act of the plaintiff and the act of the defendant, but the count goes on to aver "that the defendant, by means of the said false and fraudulent representations, wrongfully and fraudulently induced the plaintiff to become the purchaser and bearer," &c.

Judgment was given for the plaintiff on this count.

I may observe that the inducement to purchase was a false representation of the defendant. By means of that the plaintiff was deceived, and that false representation was contained in a prospectus issued by the defendant; but as his lordship impliedly admits, not delivered to the plaintiff by the defendant. It appears to me this means simply that the fact of a prospectus issued by the defendant, inducing the plaintiff to purchase, and being false and fraudulent, was enough.

In the course of the argument, Justice Coleridge said:— "It is a continuing representation to the public and amounts to a representation to whomsoever shall hold shares."

See also the *National Exchange Company* v. *Drew, in the House of Lords*, (32 Eng. L. and Eq., Rep. 10.)

The proposition of the defendant's counsel, that the action can only exist, if at all, in favor of one to whom the false and fraudulent statement has been directly made, and his reasoning to support it, is similar to that of Justice Selden in the *Farmers and Mechanics Bank* v. *The Butchers and Drovers Bank*, (Court of Appeals, December, 1857.) He cites the cases of *Grant* v. *Norway*, (10 Com. Bench R. 665,) *Coleman* v. *Riches*, (29 Eng. L. and Eq. Rep. 323,) and the *Mechanics Bank* v. *The New York and New Haven Railroad Co.*, (3 Kernan R. 599.) He says, "they are plainly distinguishable from the case before the court. In

neither of these cases was the document upon which the question arose negotiable. It was sought there to make the principal responsible for a false representation of the agent—not (responsible) to the person to whom the representation was made, but to one with whom the agent had no dealings, to whom he had made no representation."

But great distinction exists between the present case and that of the New Haven Railroad Company, or that of the Farmers and Mechanics Bank, connected with the question of a transferred responsibility. In each of these cases the directors of the companies were wholly innocent; they were themselves the victims of a misplaced confidence. But here the instrument sent forth by the directors is framed by themselves; if it was false the falsehood was their own, and the imposition it produces must be treated as the result of their own deceptive practices.

Grant v. *Norway*, commented upon by the learned justice, is fully stated by Justice Bosworth and Justice Comstock, in the New Haven Railroad case. There the immediate holder of a bill of lading had no right of action, the goods not being put on board of the vessel. The master, as agent of the owners, had not conferred any right of action upon the party to whom he gave the false bill of lading.

So in *Coleman* v. *Riches*, (29 Eng. L. and Eq. Rep. 323,) the false receipt was given by Bond, the agent of the defendant, to Lewis, and Lewis obtained money on it from the plaintiff. It was a receipt given by the keeper of the defendant's wharf when the goods had not been received, and the plaintiff was defeated.

It is true Williams, Justice, said: Suppose Riches himself had given the fraudulent receipt, would that have constituted a representation by Riches to Coleman?

This seems to me the nearest approach to the proposition that the false representation of the principal himself to one party who could support an action, is unavailing in favor of another to whom that party has transferred fully the subject matter of the action in respect to which the representation was made.

But as I understand the opinion of the court, this suggestion is contradicted. The court say: "There was no evidence from which it could be inferred as between Coleman and Riches, (plaintiff and defendant,) that Riches agreed to give the vendee of corn vouchers of the delivery, on which the vendee should act. Had there been such an agreement

it would have made the case very different, because Riches then would have undertaken to deliver vouchers to Coleman, and to employ proper persons to give such vouchers to him. But there is no evidence of anything of the kind."

At any rate I have come to the conclusion, that when a party projects and publicly promulgates the scheme of a joint stock company; when he causes the usual books to be opened, and allows or causes the inscription of a person as an owner of an interest to a definite amount and value therein, which is false within his own knowledge; when he embodies such false statements in a certificate of this right directly issued, and of the same effect as if signed by himself; when he accompanies that certificate by a written power authorizing a transfer at large, by a party to whom he has given the certificate; when that representation induces an innocent person to advance his money — the defendant's own individual act has created the privity of contract, which the cases referred to, appear to demand, and he must be held responsible to any one who has been deceived.

The representation was publicly addressed by the defendants to all; was intended to influence all who should become apprised of it; did exercise an influence upon the plaintiff, one of the mass addressed; that influence has resulted in his damage, and the fact embodied in the representation must be treated for the present as untrue, and meant to deceive.

We all agree that the order should be affirmed, with costs.

F. N. Bangs and *Daniel Lord*, for respondent.

Platt, Gerard & Buckley, and *Charles O'Conor*, for appellants.

EDITORIAL. — Several interesting articles, cases, book notices, &c., are in type, but have been crowded out of the present number.

OBITUARY NOTICE.

JOHN JAMES GILCHRIST, presiding Justice of the Court of Claims, died at Washington, after a brief illness, on the 29th of April last. This event, so great a loss to the public as well as to the profession, has called forth so many and so extensive obituary and biographical notices of the deceased, of which the most eloquent and interesting tribute to his memory and virtues appeared in the Boston Courier of the 20th ult., that we do not feel called upon to give more than a brief outline of his life, together with a condensed report of the proceedings in honor of his memory by the court over which he presided.

Judge Gilchrist was born in Medford, in this State, February 16, 1809. His boyhood was mainly passed in Charlestown, New Hampshire, and here he pursued, under the guidance of the Rev. Dr. Crosby, a portion of the studies preparatory to a collegiate course. He entered Harvard College in the autumn of 1824.

After leaving college, he commenced the study of the law at Charlestown, under the guidance of the late William Briggs. From the office of Mr. Briggs, he went to the law school in Cambridge, where he was known as a most diligent student. Upon his admission to the bar, he formed a connection in business with the late Governor Hubbard. He took some part in State politics, and was for more than a year a member of the State Legislature, but never evinced any inclination to abandon the profession of his choice for the temptations of political life. In 1840, to the general satisfaction of the bar and the public, he was appointed one of the associate Justices of the Supreme Court of New Hampshire, being then at the early age of thirty-one; and when in 1848 the place of Chief Justice was made vacant by the resignation of Judge Parker, Judge Gilchrist, according to universal expectation, received that appointment.

Here he remained until the Court of Claims was created by Congress, when he was placed at the head of this tribunal by President Pierce, who was his warm personal friend. At the time of his death, twenty-seven years had elapsed since his admission to the bar, during eighteen of which he had occupied a judicial position.

Judge Gilchrist married, in 1836, Miss Sarah Hubbard, daughter of the late Governor Hubbard. His widow and two children, — a son and daughter, — survive him.

Proceedings of the bar and the Court of Claims.

"At a meeting of the members of the bar and other officers of the Court of Claims in the Court-room, at 11 o'clock, A. M., May 3, 1858,

"R. S. Coxe, Esq., was called to the chair, and Samuel H. Huntington was appointed Secretary. The recent death of the Hon. J. J. Gilchrist, Presiding Judge of the Court of Claims, having been announced,

"On motion, B. B. French, Esq., Hon. Mr. Badger, and Hon. P. Phillips were appointed a committee to prepare and present to the meeting resolutions suitable to the occasion. The committee, on consultation, offered the following resolutions, which were unanimously adopted:

"1st. Resolved, — That we hold in the highest estimation the integrity, the distinguished services, and the exalted virtues of the late Judge Gilchrist, and deeply deplore the loss which the country has sustained by the death of one so eminently qualified for the high station which he filled.

"2. That we sympathize with his bereaved family in their affliction, who mourn the loss of an affectionate husband, a kind parent, and a good citizen.

"3 That, from respect to his memory, we will, during the present session of the court, wear the usual badge of mourning.

"4. That these resolutions be communicated to the court by the Solicitor of the United States, with the request that they be entered on the records of the court, and communicated to the family of the deceased.

"R. S. Coxe, *Chairman.*

"Saml. H. Huntington, *Secretary.*"

"The Court of Claims opened at 12 M., being the first session of the court after the death of the late Presiding Judge.

"The Hon. Montgomery Blair, Solicitor for the United States, announced the death of Judge Gilchrist as follows:

"May it please the Court, — Since the last session of this court, the death of the Hon. J. J. Gilchrist, late Presiding Judge of this court, has been announced to the public. To give expression to their feelings on this unexpected and sad event, a meeting of the bar and officers of this court was held in the court-room this morning, and resolutions expressive of their sincere regret and commemoration of the learning and virtues of our departed friend were adopted, and my brethren have honored me with the duty of bringing their proceedings to the knowledge of the court, and requesting that they may be recorded among its proceedings. In now presenting these resolutions, and making that request, I ask the indulgence of the court to say that I do most cordially concur in the eloquent eulogium which the unanimous voice of the bar has pronounced upon our deceased friend in these resolves. If the occasion were appropriate, my feelings would prompt me to enlarge upon those qualities of his mind and character which have now from us this first tribute; for he was not less distinguished by the learning and ability so suitably commemorated in these resolves, than by the kindliness of feeling and amenity of manners which engaged the affections of those with whom it was his fortune to be associated."

Eloquent and touching remarks were also made by Hon. P. Phillips and B. B. French, Esq.

"Judge Blackford replied in behalf of the court.

"The members of the court, in common with the gentlemen of the bar and other officers of the court, are deeply sensible of the loss we have all sustained by the decease of our distinguished brother. His legal and literary acquirements were very extensive, and his qualifications for the office he held were in every respect of the highest order. He brought with him to this court not only great ability and learning, but the experience of many years as Chief Justice of the highest court of his native State. It is now three years since the organization of this court, and since we first became associated on the bench with our deceased friend; and we can bear full testimony not only to his superior ability and eminent virtues, but to his constant solicitude to discharge correctly the important duties devolved upon him. In the performance of those duties he obtained, as he highly merited, the confidence of all in the purity of his motives, and the correctness of his judgment. He has been taken away in the meridian of his life, and in the midst of his usefulness, and the court, the bar, the country have great reason to lament the loss which his death has occasioned.

"We cordially unite with the bar and other officers of the court in the resolutions just presented, and order them to be entered on the records of the court, and that a copy of those proceedings be furnished to the family of the deceased."

INSOLVENTS IN MASSACHUSETTS.

Name of Insolvent.	Residence.	Commenceme't of Proceedings.	Name of Judge.
		1858.	
Allen, C. H & F. E. (1)	Charlestown,	April 17,	L. J. Fletcher.
Babson, Wm. R. (2)	Boston,	" 16,	Isaac Ames
Baker, James B. (3)	Harwich,	March 22,	Joseph M. Day.
Barnard, Hiram K.	Lowell,	April 29,	L. J. Fletcher.
Bigelow, Charles (4)	Natick,	" 8,	L. J. Fletcher.

Name of Insolvent.	Residence.	Commenceme't of Proceedings.	Name of Judge.
Bigelow, S. S. (5)	Worcester,	" 17,	Wm. W. Rice.
Brierly, James } (6) Brierly, Thomas }	Millbury,	" 7,	Wm. W. Rice.
Central Manufacturing Co.	Southbridge,	" 10,	Wm. W. Rice.
Chase, Joshua S. (3)	Harwich,	March 22,	Joseph M. Day.
Cooper, Charles	Cambridge,	April 10,	L. J. Fletcher.
Currier, Alpheus	Haverhill,	" 9,	Henry B. Fernald.
Davis, Henry	Saugus,	" 1,	Henry B. Fernald.
Deacon, Wm. (2)	Boston,	" 16,	Isaac Ames.
DeMortie, Mark R.	Boston,	" 1,	Isaac Ames.
Dennis, Azro B.	Charlestown,	" 26,	Isaac Ames.
Dyer, Benj. B.	Boston,	" 3,	Isaac Ames.
Ford, Horace K.	Haverhill,	" 21,	Henry B. Fernald.
Foss, Charles M. (7)	Boston,	" 5,	Isaac Ames.
Frost, Julius B.	Methuen,	" 24,	Henry B. Fernald.
Fuller, George	Wrentham,	" 12,	Francis Hilliard.
Goldthwait, Moses, Jr.	Salem,	" 1,	Henry B. Fernald.
Goodridge, Moses E.	Haverhill,	" 22,	Henry B. Fernald.
Goodspeed, Saml. A.	Worcester,	" 21,	Wm. W. Rice.
Gregory, Benj. C. (8)	Boston,	" 5,	Isaac Ames.
Hall, Aaron M.	Roxbury,	" 13,	Francis Hilliard.
Hartwell, Alfred	Worcester,	" 1,	Wm. W. Rice.
Hawks, James M } (9) Hawks, John }	Holliston,	" 26,	L. J. Fletcher.
Houghton, Josiah P.	Worcester,	" 22,	Wm. W. Rice.
Howard, Edwin F. (8)	Boston,	" 5,	Isaac Ames.
Howard, Lyman (4)	Natick,	" 8,	L. J. Fletcher.
Hunt, Jonathan	Weymouth,	" 2,	Francis Hilliard.
Kimball, Oliver	Charlestown,	" 28,	L. J. Fletcher.
Kinsley, Lyman	Canton,	" 3,	Francis Hilliard.
Lincoln, Albert L. (7)	Brookline,	" 5,	Isaac Ames.
Mann, George E.	Worcester,	" 10,	Wm. W. Rice.
Martin, Thomas	Spencer,	" 16,	Wm. W. Rice.
Mead, Wm. H.	Boston,	" 8,	Isaac Ames.
Morse, James	Worcester,	" 20,	Wm. W. Rice.
Morton, Thomas	Cambridge,	" 14,	L. J. Fletcher.
Newman, Edward A. } (10) Newman, Henry J. }	Andover,	" 12,	Henry B. Fernald.
Nichols, George N.	Newton,	" 26,	Isaac Ames.
Pattee, Enoch D. } (12) Pattee, Wm. H. }	W. Cambridge,	" 9,	L. J. Fletcher.
	Franklin,	" 14,	Francis Hilliard.
Pond, Goldsbury	Deerfield,	" 22,	H. I. Hodges.
Pratt, Joshua G.	North Andover,	" 20,	Isaac Ames.
Putnam, John Pickering	Townsend,	" 20,	L. J. Fletcher.
Rand, Wareham	Roxbury,	" 5,	Isaac Ames.
Randall, John N.	Stoneham,	" 29,	L. J. Fletcher.
Richardson, Caleb	Medford,	" 9,	L. J. Fletcher.
Richards, Nathan	Worcester,	" 17,	Wm. W. Rice.
Smith, Moore (5)	Barnstable,	" 1,	Joseph M. Day.
Tobey, Freeman C.	Cambridge,	" 1,	Isaac Ames.
Towle, Eben'r. (11)	Haverhill,	" 12,	Henry B. Fernald.
Treat, George	Weymouth,	" 22,	Francis Hilliard.
Trott, Rufus K.	Worcester,	" 2,	Wm. W. Rice.
Trowbridge, Joseph A.	Dracut,	" 9,	L. J. Fletcher.
Varnum, Geo. W.	Lynn,	" 20,	Henry B. Fernald.
Vickary, Nathl.	Boston,	" 1,	Isaac Ames.
Wentworth, Geo. S. (11)	Natick,	" 20,	L. J. Fletcher.
Whelan, Thomas	Boston,	" 30,	Isaac Ames.
Wingate, Andrew T.			

(1) C. H. & F. E. Allen.
(2) Babson & Deacon.
(3) Baker & Chase.
(4) Bigelow & Howard.
(5) Bigelow & Smith.
(6) James Brierly & Co.
(7) Lincoln & Foss.
(8) Howard & Gregory.
(9) John Hawks & Co.
(10) H. J. & E. A. Newman.
(11) Towle & Wentworth.
(12) Pattee, E. D. & W. H.

ERRATA. — Page 68, line 7 from bottom, for "1851," read "1781." Page 79, line 10 from bottom, for "their courts," read "them."